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# INDIAN SUCCESSION ACT

(ACT XXXIX OF 1925)

### WITH

STATEMENT OF OBJECTS AND REASONS NOTES ON CLAUSES REPORT OF THE JOINT COMMITTEE COMPARATIVE TABLES INDIAN AND ENGLISH CASE LAW AND MODEL FORMS

### EDITED BY

### B B MITRA, BA, BL

AUTHOR OF CRIMINAL PROCEDURE CODE INDIAN LIMITATION ACT TRANSFER OF PROPERTY ACT PROVINCIAL SMALL CAUSE COURTS ACT GUARDIANS AND WARDS ACT ETC ETC

### FIFTH EDITION

REVISED AND BROUGHT UP TO-DATE

BY

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Author of the Paint and Revenue Sale Laws
The Indian Registration Act The Law of Civil
Appeal and Revision Etc Etc

CASTERN LAW HOUSE

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### PREFACE TO THE FIFTH EDITION

The present work is put forward as the fifth edition of the late Mr B B Mitra's 'The Indian Succession Act', also its predecessor the fourth edition of the book was prepared by the present editor. In preparing the edition now submitted to the profession the editor has ventured to work with a free hand and a considerable portion of the work has been re written and remodelled. But the scheme adopted is no more than a development of the late author's plan, and what he wrote has been, as far as possible retained. Throughout the present edition the editor has endeavoured to harmonise the old matter with the new so as to carry out as far as possible the late author's idea in making the work useful to the profession

The Amendments introduced by Act XVII of 1939 have been incorporated in the work. The case laws reported since the last edition was published have been noticed in this edition.

The editor expresses his hearty thanks to Mr D K De MA, BL, for helping him with valuable suggestions in compiling this work

CALCUTTA,
15th August 1940

K N BHAUMIK

दिवगत श्री गोविन्दलाल जी व्याप की स्मृति मे नागरी भड़ार, बीकानेर को प्रदत।

### PREFACE TO THE FOURTH EDITION

The task of editing and revising the third edition of the late lamented B B Mitra's The Indian Succession Act was imposed upon me. In discharging my duty I deemed it proper and necessary to introduce some changes in the arrangement of the subjects dealt with and to sub-divide some headings under different heads. I have incorporated some new matters and made the work up to date with the decisions reported since the last edition was published. The recent amendments effected by the Government of India (Adaptation of Indian Laws) Order. 1937. have been noticed in the book. I have also inserted an Addinda of cases reported while the book was in the Press.

I express my hearty thanks to Mr D K De MA BL for helping me with valuable suggestions in the compilation of the worl

CALCUTTA	}	К	N	BHAUMIK
2nd August 1938	5			

# एपर सात्य एव वान्त्रीले 12001

The Indian Succession Act is at once a substantive and a procedural enactment and it is curious to note that the Legislature has almost equally divided this Act into these two branches. Parts I to VI (comprising sections I to 191) may be said to contain the substantive portion of the law and the remaining Parts provide the procedure. So far as the latter portion is concerned the enactment is an excellent piece of legislation which has stood the test of three quarters of a century without the necessity of any amendment of a serious nature. But as regards the substantive portion I still repeat what I have said in the first edition of this work our that it is incomplete misleading and several portions of it are totally unnecessary as being altogether foreign to the ideas of the people of this

country

The Part relating to intestate succession is hopelessly incomplete. It is inconcervable why the framers of the present Act were satisfied only with enunciating the rules of succession with regard to Christians and Parsis leaving Hindus and Mahomedans severely alone Such an action might have been justified under the Act of 1865 when the principles of succession governing the Hindus and Mahomedans had not been definitely But much water has flowed down the Ganges since then and the Hundu and Mahomedan rules of succession the codification of which was inconceivable in those days have been actually codified by Sir Dinshaw Mulla and Sir Hari Singh Gour The Legislature might well have availed themselves of the labours of these eminent jurists, and have incorporated those provisions (with such modifications as they might deem necessary) into this Act But unfortunately, the framers of the rev Act were determined not to add a single line to the Act of 1865 with the result that the Indian Succession Act has become a missione in the sense that it does not provide for the intestate success on of the majority of Indians and remains, as it has so long remained an incomplete last of succession

Coming to the Part relating to testamentary succession, one will find that a large number of sections has been denoted to surjects which are on one to the testators of this country. The leasters fail to take notice of the fact that Indians line under a summer configuration of Electric Englishmen and seldom make a composite fact of proper advantagementation of the memorable and marked of the formular of

Tigore Law Lectures The distinction between vested and contingent interests the various divisions of legacies the provisions as to ademption the doctrine of election and various other doctrines borrowed from English law, are extremely premature. These provisions, when first codified in the Indian Succession Act, were rightly declared to be inapplicable to Hindian and Mahomedans. But the mischief was created by the Hindu Wills Act of 1870, the sponsors of which took into their heads to engraft these parasites of English jurisprudence on the laws of a simple minded nation. But seventy years have elapsed without these principles being seriously put into practice perhaps a century will pass and still they will remain un applied and unnoticed. They will serve no other purpose except that of unnecessarily expanding the Statute book.

These remarks may well apply to certain portions of the procedural branch amongst which mention may be made of the chapter on limited grants

The present edition of the bool is not merely a reprint of the old edition with the new rulings added but is a thorough revision of the whole commentary a major portion of which has been re written with a minute analysis of the case law

B B MITRA

19th September, 1934

# INDIAN SUCCESSION ACT

### CONTENTS

Part I
PRELIMINARY

21412001

### SECTIONS

- 1 Short title
- Definitions.
- 3 Power of Local Government to exempt any race sect or tribe in the territories administered by the Local Government from operation of Act

### Part II

### OF DOMICILE

- 4 Application of Part
- 5. Law regulating succession to deceased person a immoveable and moveable property respectively
- of One domicile only affects succession to moveables
- 7 Domicile of origin of person of legitimate birth
- 8 Domicile of origin of illegitimate child
- 9 Continuance of donucile of origin
- 10 Acquisition of new domicile.
- 11 Special mode of acquiring domicile in British India.
- 12 Domicile not acquired by residence as representative of foreign Government or as part of his family
- ✓13 Continuance of new domicile.
  - 14 Minor s domicile
  - 15 Domicile acquired by woman on marriage
  - 16 Wife's domicile during marriage
  - 17 Minor's acquisition of new domicile
- 18 Lunatic's acquisition of new domicile.
  - 19 Succession to moveable property in British India in absence of proof of domicile elsewhere

Part III

- 20 Interests and powers not accounted nor lost by marriage
- 21 Effect of marriage between person domiciled and one not domiciled in Butish India
- 22 Settlement of minor's property in contemplation of marriage



- 23 Application of Part
- 24 kindred or consanguinity
- 25 Lineal consanguinity
- 26 Collateral consanguinity
- 27 Persons held for purpose of succession to be similarly related to deceased
- 28 Mode of computing degrees of kindred

Part V
INTESTATE SUCCESSION

### Preliminary

- 29 Application of Part
- 30 As to what property deceased considered to have died intestate

### CHAPTER II

### Rules in cases of Intestates other than Parsis

- 31 Chapter not to apply to Parsis
- 32 Devolution of such property
- 33 Where intestate has left widow and lineal descendants or widow and kindred only or widow and no kindred
- 33A Special provision where intestate has left uidow and no lineal descendants
- 34 Where intestate has left no widow and where he has left no kindred
- 35 Rights of widower

40

### Distribution where there are lineal descendants

- 36 Rules of distribution
- 37 Where intestate has left child or children only
- 38 Where intestate has left no child but grandchild or grandchildren
- 39 Where intestate has left only great grand children or remoter lineal descendants
  - Where intestate leaves lineal descendants not all in same degree of kindred to him and those through whom the more remote are descended are dead

### Distribution where there are no lineal descendants

- 41 Rules of distribution where intestate has left no lineal descendants
- 42 Where intestate's father living
- 43 Where intestate's father dead but his mother brothers and sisters living
- 44 Where intestates father dead and his mother a brother or sister and children of any deceased brother or sister living
- Where intestates father dead and his mother and children of any deceased brother or sister living
- 46 Where intestates father dead but his mother living and no brother si ter nephew or niece
- 47 Where intestate has left neither lineal descendant nor father nor mother
- 48 Where intestate has left neither lineal descendant nor parent nor brother nor sister
- 49 Children's advancements not brought into hotchpot

### CONTENTS

### CHAPTER III

### Special Rules for Parsi Intestates SECTIONS

50 General principles relating to infestate succession

Division of a male intestate's property among his widow children and parents Division of a female intestate's property among her widower and children

53 Division of share of predeceased child of intestate leaving lineal descendants

Division of property where intestate leaves no lineal descendant but leaves a 54 widow or widower or a widow of a lineal descendant

Division of property where intestate leaves neither lineal descendants nor a widow of any lineal descendant

56 Division of property where there is no relative to succeed under the provisions of this Chapter

### Part VI

### TESTAMENTARY SUCCESSION

### CHAPTER I Introductory

Application of certain provisions of Part to a class of wills made by Hindus etc

58 General application of Part

### CHAPTER II

Of Wills and Codicils

Person capable of making wills

60 Testamentary guardian

, 61 Will obtained by fraud coercion or importunity

Will may be revoked or altered

### CHAPTER III

Of the Execution of unprivileged Wills

63 Execution of unprivileged wills

\_64 Incorporation of papers by reference

### CHAPTER IV

Of privileged Wills

65. Privileged wills.

66 Mode of making and rules for executing privileged wills

### CHAPTER V

Of the Attestation Revocation Alteration and Revival of Wills

Effect of gift to attesting witness.

68 . Witness not disqualified by interest or by being executor

Revocation of will by testator's marriage \70 Revocation of unprivileged will or codicil

71 Effect of obliteration interlineation or alteration in unprivileged will,

72 Revocation of privileged will or codicil

73 Revival of unprivileged will S-B

### CHAPTER VI

### Of the Construction of Wills

### SECTIONS

- 74 Wording of will
- 75 Inquiries to determine questions as to object or subject of will.
- 76 Misnomer or misdescription of object
- 77 When words may be supplied
- 78 Rejection of erroneous particulars in description of subject
- 79 When part of description may not be rejected as erroneous
- 80 Extrinsic evidence admissible in cases of latent ambiguity
- 81 Extrinsic evidence inadmissible in case of patent ambiguity or deficiency
- 82 Meaning of clause to be collected from entire will 83 When words may be understood in restricted sense and when in sense wider
  - than usual
- 84 Which of two possible constructions preferred 85 No part rejected if it can be reasonably construed
- 86 Interpretation of words repeated in different parts of will
- 87 Testator's intention to be effectuated as far as possible
- 88 The last of two inconsistent clauses prevails
- 89 Will or bequest yord for uncertainty
- 90 Words describing subject refer to property answering description at testators death
- 91 Power of appointment executed by general bequest
- 92 Implied gift to objects of power in default of appointment
- 93 Bequest to heirs etc of particular person without qualifying terms.
- 94 Bequest to representatives etc of particular person
- 95 Bequest without words of limitation
- 96 Bequest in alternative
- 97 Effect of words describing a class added to bequest to person
- 98 Bequest to class of persons under general description only
- 99 Construction of terms
- 100 Words expressing relationship denote only legitimate relatives or failing such relatives reputed legitimate
- 101 Rules of construction where will purports to make two bequests to same person
- 102 Constitution of residuary legatee
- 103 Property to which residuary legatee entitled
- 104 Time of vesting legacy in general terms
- 105 In what case legacy lapses
- 106 Legacy does not lapse if one or two joint legatees die before testator
- 107 Effect of words showing testator's intention to give distinct shares
- 108. When lapsed share goes as undisposed of
- 109 When bequest to testators child or lineal descendant does not lapse on his death in testators life-time
  - 110 Bequest to A for benefit of B does not lapse by As death
  - 111 Survivorship in case of bequest to described class.

### CHAPTER VII

### Of roid Bequests

112 Bequest to person by particular description who is not in existence at testator's

- 113 Bequest to person not in existence at testator's death subject to prior bequest
- -114 Rule against perpetuity
  - 115 Bequest to a class some of whom may come under rules in sections 113 and 114
  - 116 Bequest to take effect on failure of bequest yord under sections 113 114 or 115
  - 117 Effect of direction for accumulation
  - 118 Bequest to religious or charitable uses

### CHAPTER VIII

### Of the vesting of Legacies

- 119 Date of vesting of legacy when payment or possession postponed
- 120 Date of vesting when legacy contingent upon specified uncertain event
- 121 Vesting of interest in bequest to such members of a class as shall have attained particular age

### CHAPTER IX

### Of Onerous Bequests

- 122 Onerous bequests.
- 123 One of two separate and independent bequests to same person may be accepted and other refused

### CHAPTER X

- Of Contingent Bequests
- 24 Bequest contingent upon specified uncertain event no time being mentioned for its occurrence
  - 125 Bequest to such of certain persons as shall be surviving at some period not specified

### CHAPTER XI

### Of Conditional Bequests

- 126 Bequest upon impossible condition
- 127 Bequest upon illegal or immoral condition
- 128 Fulfilment of condition precedent to vesting of legacy
- 129 Bequest to A and on failure of prior bequest to B
- 130 When second bequest not to take effect on failure of first
- 131 Bequest over conditional upon happening or not happening of specified uncertain event
- 132 Condition must be strictly fulfilled.
- 133 Original bequest not affected by invalidity of second
- 134 Bequest conditioned that it shall cease to have effect in case a specified uncertain event shall happen or not happen
- -135 Such condition must not be invalid under section 120
- 136 Result of legatee rendering impossible or indefinitely postponing act for which no time specified and on non-performance of which subject matter to go over
- Vi37 Performance of condition precedent or subsequent within specified time.

  Further time in case of fraud

### THE INDIAN SUCCESSION ACT

### Of Bequests with Directions as to Application or Enjoyment

### SECTIONS

- 138 Direction that fund be employed in particular manner following absolute bequest of same to or for benefit of any person
- 139 Direction that mode of enjoyment of absolute bequest is to be restricted to secure specified benefit for legatee
- 140 Bequest of fund for certain purposes some of which cannot be fulfilled

### CHAPTER XIII

### Of Bequests to an Executor

141 Legatee named as executor cannot take unless he shows intention to act as executor

### CHAPTER XIV

### Of Specific Legacies

- 142 Specific legacy defined
- 143 Bequest of certain sum where stocks etc in which invested are described
- 144 Bequest of stock where testator had at date of will equal or greater amount of stock of same kind 145 Bequest of money where not payable until part of testator's property disposed
  - of in certain way
- When enumerated articles not deemed specifically bequeathed 146
- Retention in form of specific bequest to several persons in succession 147 148 Sale and investment of proceeds of property bequeathed to two or more persons
- 171 SUCCESSION 149 Where deficiency of assets to pay legacies specific legacy not to abate with general legacies

### CHAPTER XV

### Of Demonstrature Legacies

- 150
- Demonstrative legacy defined 151 Order of payment when legacy directed to be paid out of fund the subject of specific legacy

### CHAPTER XVI

### Of Ademption of Legacies

152 Ademption explained

Non ademption of demonstrative legacy

153

- 154 Ademption of specific bequest of right to receive something from third party
- 155 Ademption pro tanto by testator's receipt of part of entire thing specifically bequeathed
- 156 Ademption by tanto by testator's receipt of portion of entire fund of which portion has been specifically bequeathed
- 157 Order of payment where portion of fund specifically bequeathed to one legatee and legacy charged on same fund to another and testator having received portion of that fund remainder insufficient to pay both legacies
- 158 Ademption where stock specifically bequeathed does not exist at testator's death

- Ademption pro tanto where stock specifically bequeathed exists in part only 159 at testators death
- Non ademption of specific bequest of goods described as connected with certain 160 place by reason of removal
- When removal of thing bequeathed does not constitute ademption 161
- When thing bequeathed is a valuable to be received by testator from third 162 person and testator himself or his representative receives it
- Change by operation of law of subject of specific bequest between date of 163 will and testator's death
- 164 Change of subject without testator's knowledge
- 165 Stock specifically bequeathed lent to third party on condition that it be replaced
- Stock specifically bequeathed sold but replaced and belonging to testator at 166 his death CHAPTER XVII

- Of the Payment of Liabilities in respect of the subject of a Bequest
- Non liability of executor to exonerate specific legatees 167
- 168 Completion of testator's title to things bequeathed to be at cost of his estate
- 169 Exoneration of legatee's immoveable property for which land revenue or rent payable periodically
- 170 Experation of specific legatee's stock in joint stock company

### CHAPTER XVIII

Of Bequests of thmes described in General Terms

171 Bequest of thing described in general terms

### CHAPTER XIX

Of Bequests of the Interest or Produce of a Fund

172 Bequest of interest or produce of fund

### CHAPTER XX

Of Bequests of Annuities

- Annuity created by will payable for life only unless contrary intention appears
- 174 Period of vesting where will directs that annuity be provided out of proceeds of property or out of property generally or where money bequeathed to be invested in purchase of annuity
- 175 Abatement of annuity
- 176 Where gift of annuity and residuary gift whole annuity to be first satisfied CHAPTER XXI

### Of Legacies to Creditors and Portioners

- 177 Creditor prima facie entitled to legacy as well as debt
- Child prima facie entitled to legacy as well as portion 178
  - 179 No ademption by subsequent provision for legatee

### CHAPTER AXII

Of Election

- Circumstances in which election takes place
- 181 Devolution of interest relinquished by owner

185

- 182 Testator's belief as to his ownership immaterial
- 183 Bequest for man's benefit how regarded for purposes of election 184 Person deriving benefit indirectly not put to election

- to take in opposition 186 Exception to provisions of last six sections. 187 When acceptance of benefit given by will constitutes election to take under Hear

Person taking in individual capacity under will may in other character elect

- 188 Circumstances in which knowledge or waiver is presumed or inferred
- 189 When testator's representatives may call upon legated to elect
- 190 Postponement of election in case of disability

### CHAPTER XXIII

Of Gifts in Contemplation of Death

Property transferable by gift made in contemplation of death 191

## Part VII X PROTECTION OF PROPERTY OF DECEASED

- Person claiming right by succession to property of deceased may apply for rehef against wrongful possession
- 193 Inquiry made by Judge
- Procedure 194
- Appointment of curator pending determination of proceeding 195
- Powers conferable on curator 196
- 197 Prohibition of exercise of certain powers by curators Payment of debts etc
- 198 Curator to give security and may receive remuneration
- 199 Report from Collector where estate includes revenue paying land
- 200 Institution and defence of suits
- 201 Allowances to apparent owners pending custody by curator
- 202 Accounts to be filed by curator 203 Inspection of accounts and right of interested party to keep duplicate
- 204 Bar to appointment of second curator for same property
- 205 Limitation of time for application for curator 206 Bar to enforcement of Part against public settlement or legal directions by deceased
- 207 Court of Wards to be made curator in case of minors having property subject to its jurisdiction
- 208 Saving of right to bring suit
- 209 Effect of decision of summary proceeding
- 210 Appointment of public curators

### Part VIII

REPRESENTATIVE TITLE TO PROPERTY OF DECEASED ON SUCCESSION

- Character and property of executor or administrator as such 211
- Right to intestate a property 212
- Right as executor or legatee when established 213

- 214 Proof of representative title a condition precedent to recovery through the

  Courts of debts from debtors of deceased persons
- 215 Effect on certificate of subsequent probate or letters of administration
- 216 Grantee of probate or administration alone to sue etc until same revoked

### Part IX

PROBATE LETTERS OF ADMINISTRATION AND ADMINISTRATION OF ASSETS OF DECEASED

17 Application of Part

### CHAPTER I

### Of Grant of Probate and Letters of Administration

- 218 To whom administration may be granted where deceased is a Hindu Muhammadan Buddhist Sikh Jaina or exempted person
- 219 Where deceased is not a Hindu Muhammadan Buddhist Sikh Jaina or exempted person
- 220 Effect of letters of administration
- 221 Acts not validated by administration
- 222 Probate only to appointed executor
- 223 Persons to whom probate cannot be granted
- 224 Grant of probate to several executors simultaneously or at different times
- 225 Separate probate of codicil discovered after grant of probate
- 226 Accrual of representation to surviving executor
- 227 Effect of probate
  - 228 Administration with copy annexed of authenticated copy of will proved abroad
  - 229 Grant of administration where executor has not renounced
  - 230 Form and effect of renunciation of executorship
  - 231 Procedure where executor renounces or fails to accept within time limited
  - 232 Grant of administration to universal or residuary legatees
  - 233 Right to administration of representative of deceased residuary legatee
  - 234 Grant of administration where no executor nor residuary legatee nor re presentative of such legatee
  - 235 Citation before grant of administration to legatee other than universal or residuary
- 236 To whom administration may not be granted

### CHAPTER II

### OF LIMITED GRANTS

### Grants limited in duration

- 237 Probate of copy or draft of lost will
- 238 Probate of contents of lost or destroyed will
- 239 Probate of copy where original exists

### 240 Administration until will produced

Grants for the use and benefit of others having right

- 241 Administration with will annexed to attorney of absent executor
- 242 Administration with will annexed to attorney of absent person who if present, would be entitled to administer

- 243 Administration to attorney of absent person entitled to administer in case of intestaci
  - 244 Administration during minority of sole executor or residuary legatee
  - 245 Administration during minority of several executors or residuary fematees.
  - 246 Administration for use and benefit of lunatic or minor
  - 247 Administration bendente lite

### Grants for special purposes

- 218 Probate limited to purpose specified in will
- Administration with will anneved limited to particular purpose 249
- 250 Administration limited to property in which person has beneficial interest
- 251 Administration limited to suit
- Administration limited to purpose of becoming party to suit to be brought 252 against administrator 253
  - Administration limited to collection and preservation of deceased a property
- 254 Appointment as administrator of person other than one who in ordinary circumstances would be entitled to administration

### Grants with exception

- Probate or administration with will annexed subject to exception 255
- Administration with exception 256

### Grants of the rest

257 Probate or administration of rest

### Grant of effects unadministered

- Grant of effects unadministered 258
- 259 Rules as to grants of effects unadministered
- 260 Administration when limited grant expired and still some part of estate unadministered

### CHAPTER III

### Alteration and Revocation of Grants

- What errors may be rectified by Court
- 262 Procedure where codicil discovered after grant of administration with will annexed
- 263 Revocation or annulment for just cause

### CHAPTER IV

### Of the Practice in granting and revoking Probates and Letters of Administration

- Jurisdiction of District Judge in granting and revoking probates etc
- 264 265 Power to appoint Delegate of District Judge to deal with non-contentious
- 266 District Judge's powers as to grant of probate and administration
- 267 District Judge may order person to produce testamentary papers
- 268 Proceedings of District Judge's Court in relation to probate and administration
- When and how District Judge to interfere for protection of property 269
- 270 When probate or administration may be granted by Di trict Judge
- Disposal of application made to Judge of district in which deceased had no 271 fixed abode

### CONTENTS.

SECTIONS 273

- 272 Probate and letters of administration may be granted by Delegate. Conclusiveness of probate or letters of administration
- Transmission to High Courts of certificate of grants under proviso to ection 274 273
  - Conclusiveness of application for probate or administration if properly made 275 and verified
  - 270 Petition for probate
  - 277 In what cases translation of will to be annexed to petition. Verification of translation by person other than Court translator
  - 278 Petition for letters of administration
  - Addition to statement in petition etc. for probate or letters of administration 279 in certain cases
  - 280 Petition for probate etc to be signed and verified
  - Verification of petition for probate by one witness to will 281
  - 282 Punishment for false averment in petition or declaration
  - 283 Powers of District Judge
  - 281 Caveats against grant of probate or administration Form of caveat
  - 285 After entry of caveat no proceeding taken on petition until after notice to caveator
  - 286 District Delegate when not to grant probate or administration
  - Power to transmit statement to District Judge in doubtful cases where no 287 contention
  - 288 Procedure where there is contention or District Delegate thinks probate or letters of administration should be refused in his Court.
  - 289 Grant of probate to be under scal of Court
  - 290 Grant of letters of administration to be under seal of Court
  - 291 Administration bond
  - 292 Assignment of administration bond
  - 293 Time for grant of probate and administration
  - 294 Filing of original wills of which probate or administration with will annexed granted
  - 295 Procedure in contentious cases
  - 296 Surrender of revoked probate or letters of administration
  - 297 Payment to executor or administrator before probate or administration revoked
  - 298 Power to refuse letters of administration
  - 299 Appeals from orders of District Judge
  - 300 Concurrent jurisdiction of High Court
  - Removal of executor or administrator and provision for successor 301
  - 302 Directions to executor or administrator

### CHAPTER V

### Of Executors of their oun urong

- 303 Executor of his own wrong
- 304 Liability of executor of his own wrong

### CHAPTER VI

Of the poucrs of an Executor or Administrator

- 305 In respect of causes of action surviving deceased and rents due at death
- Demands and rights of action of or against deceased survive to and against executor or administrator
- 307 Power of executor or administrator to dispose of property

311

- 308 General powers of administration
- 309 Commission or agency charges
- 313 Powers of administrator of effects unadministered
- Purchase by executor or administrator of deceased a property Powers of several executors or administrators exercisable by one 312 Survival of powers on death of one of several executors or administrators
- 314 Powers of administrator during minority
- 315 Powers of married executrix or administratrix

### CHAPTER VII

### Of the Duties of an Executor or Administrator

- 316 As to deceased a funeral
- 317 Inventory and account
- 318 Inventory to include property in any part of British India in certain cases
- 319 As to property of and debt owing to deceased
- 320 Expenses to be paid before all debts
- 321 Expenses to be paid next after such expen es
- 322 Wages for certain services to be next paid and then other debts
- 323 Save as aforesaid all debts to be paid equally and rateably
- 324 Application of moveable property to payment of debts where domicile not in British India
- 325 Debts to be paid before legacies
- 326 Executor or administrator not bound to pay legacies without indemnity
- 327 Abatement of general legacies
- 328 Non abatement of specific legacy when assets sufficient to pay debts
- 329 Right under demonstrative legacy when assets sufficient to pay debts and necessary expenses
- 330 Rateable abatement of specific legacies
- 331 Legacies treated as general for purpose of abatement

### CHAPTER VIII

### Of Assent to a Legacy by Executor or Administrator

- 332 Assent necessary to complete legatees title
- 333 Effect of executor s assent to specific legacy
- 334 Conditional assent
- 335 Assent of executor to his own legacy
- 336 Effect of executor's assent
- 337 Executor when to deliver legacies

### CHAPTER IX X

### Of the Payment and Apportsonment of Annusties

- 338 Commencement of annuity when no time fixed by will
- 339 When annuity to be paid quarterly or monthly first falls due
- Dates of successive payments when first payment directed to be made within 340 given time or on day certain death of annuitant before date of payment

## CHAPTER X Of the Investment of Funds to provide for Legacies

- 341 Investment of sum bequeathed where legacy not specific given for life
- 342 Investment of general legacy to be paid at future time disposal of intermediate interest

343 Procedure when no fund charged with or apportioned to annuity

Transfer to residuary legatee of contingent bequest

- Investment of residue bequeathed for life without direction to invest in 345 particular securities
- Investment of residue bequeathed for life with direction to invest in specified 346 securities.
- 347 Time and manner of conversion and investment
- 348 Procedure where minor entitled to immediate payment or possession of bequest and no direction to pay to person on his behalf

### CHAPTER XI /

### Of the Produce and Interest of Legacies

- 349 Legatee's title to produce of specific legacy
- 350 Residuary legatee's title to produce of residuary fund
- 351 Interest when no time fixed for payment of general legacy
- 352 Interest when time fixed
- 353 Rate of interest
- 354 No interest on arrears of annuity within first year after testator's death
- Interest on sum to be invested to produce annuity 355

### CHAPTER AII

### Of the Refunding of Legacies

- 356 Refund of legacy paid under Court's orders
- 357 No refund if paid voluntarily
- 358 Refund when legacy has become due on performance of condition within further time allowed under section 137
- 359 When each legatee compellable to refund in proportion
- 360 Distribution of assets
- 361 Creditor may call upon legatee to refund
- 362 When legatee not satisfied or compelled to refund under sec 361 cannot oblige one paid in full to refund
- 363 When unsatisfied legatee must first proceed against executor if solvent
- 364 Limit to refunding of one legatee to another
- 365 Refunding to be without interest
- 366 Residue after usual payments to be paid to residuary legatee
- 367 Transfer of assets from British India to executor or administrator in country of domicile for distribution

### CHAPTER XIII

### Of the Liability of an Executor or Administrator for Decastation

- Liability of executor or administrator for devastation
- Liability of executor or administrator for neglect to get in any part of property

# Part X Succession Certificates

- 370 Restriction on grant of certificates under this Part
- 371 Court having purisdiction to grant certificate 372 Application for certificate

- 373 Procedure on application
- 374 Contents of certificate
- 375 Requisition of security from grantee of certificate
- 376 Extension of certificate
- 377 Forms of certificate and extended certificate
- 378 Amendment of certificate in respect of powers as to securities
- 379 Mode of collecting Court fees on certificates
- 380 Local extent of certificate
- 381 Effect of certificate
- 382 Effect of certificate granted or extended by Briti h representative in Foreign State
  - 383 Revocation of certificate
  - 384 Appeal
  - 385 Effect on certificate of previous certificate probate or letters of administration
- 386 Validation of certain payments made in good faith to holder of invalid certificate
- 387 I ffect of decisions under this Act and liability of holder of certificate there under
- 388 Investiture of inferior Courts with jurisdiction of District Court for purposes of this Act
- 389 Surrender of superseded and invalid certificates
- 390 Provisions with respect to certificates under Bombay Regulation VII of 1827



391 Savings 392 [Repealed]

SCHEDULES

SCHEDULE I - Table of Consanguinity

SCHEDULE II -

Part I -- Order of next of kin in case of Parsi intestates referred to to in section 55 (b)

Part II - Order of next of kin in case of Parsi intestates referred to in section 56

SCHEDULE III —Provisions of Part VI applicable to certain Wills and Codicils described in section 57

SCHEDULE IV -- Form of Certificate

SCHEDULE V -Form of Caveat

SCHEDULE VI -Form of Probate

SCHEDULE VII -Form of Letters of Administration

SCHEDULE VIII - Forms of Certificate and Extended Certificate

Schedule 13 - [Repealed]

### COMPARATIVE TABLES

### TABLE I

{Showing distribution in the New Act of the Sections of the Acts repealed}

A

ζ

### The Succession Property Protection Act (XIX of 1841)

Sections of Act XIX of 1841	Sections of the new Act	
1 1 2 3 4 4 5 5 6 6 7 8 9 10 1 1 12 13 14 15 16 17 18 19	192 (1) 192 (2) 193 194 195 196 196 197 200 201 202 7 203 204 205 206 207 208 209 210	

B Indian Succession Act (X of 1865)

Sections of Act X of 1865	Sections of the new Act	Sections of Act X of 1865	Sections of the new Act
1 2 3 3 4 5 6 7 8 9 9 0 11 2 11 2 11 4 5 16 6 7 18 9 20 1 12 22 3 2 2 2 2 2 2 2 3 3 3 4 5 3 6 3 7 3 8 3 9 4 0 1 4 2 4 4 4 4 4 4 4 4 4 4 4 4 4 4 4 4 4	1 217 22 20 5 6 7 7 8 9 9 111 113 115 117 115 117 115 117 115 117 115 117 115 117 115 117 115 117 115 117 115 117 115 117 115 117 115 117 117	7 of 1865 57 58 59 661 665 666 667 67712 773 786 7777 78 80 811 823 845 888 899 91 823 888 899 91 823 889 91 823 889 91 823 888 899 91 823 889 9100 910 800 800 800 800 800 800 800 800 800 8	70 70 71 72 72 73 74 76 76 776 778 80 80 81 82 83 84 85 86 87 87 889 90 91 91 101 102 103 104 106 107 108 109 110 1112 1112
47 48 49 50 51 52 53 54 55 56	61 62 63 64 65 66 67 68	104 105 106 107 108 109 110 111	116 117 118 119 120 121 122 123 124 125

Sections of Act X of 1865	Sections of the new Act.	Sections of Act X of 1865	Sections of the new Act
113 114 115 116 117 118 119 120 121 122 123 124 125 126 127 128 129 130 131 131 132 133 133 134 135 136 137 138 139 139 141 141 145 146 146 146 146 146 146 146 146 146 146	new Act.  126 127 128 129 130 131 132 133 134 135 136 137 138 139 140 141 142 144 145 146 147 148 149 150 151 152 153 155 156 166 161 162 163 164 1667 168 169 170 171 172	X of 1865  173 174 175 176 177 178 180 181 181 182 183 184 185 185 186 187 189 190 191 192 193 194 195 196 197 198 199 200 201 201 202 203 204 205 206 207 208 209 2110 2112 212 213 224 215 216 216 217 218 219	new Act  187 188 (1) 188 (2) 189 190 191 211 222 223 224 224 225 225 226 227 227 226 221 229 220 221 229 220 221 229 220 221 229 220 231 229 230 231 229 230 231 232 233 233 233 234 245 246 247 248 246 247 248 249
161 162 163 164 165 166 167 168 169 170 171	174 175 176 177 178 179 180 181 182 183 184 184	221 222 223 224 225 226 227 228 229 230 231 231 232 233	250 251 252 253 254 255 256 257 258 259 259 260 261

Sections of Act	Sections of the	Sections of Act	Sections of the
X of 1865	new Act	\( \lambda \) of 1865	new Act
231 235 A 236 237 238 239 240 241 241 A 241 A 242 A 243 A 244 245 246 A 247 248 249 220 220 221 221 222 223 224 244 245 246 A 247 248 249 220 220 220 220 220 220 220 220 220 22	263 264 265 266 267 268 269 2277 268 277 273 277 277 277 277 278 279 280 281 281 281 4) Sch VI 291 292 283 284 284 285 289 58h VI 291 291 292 293 294 306 306 306 306 306 306 306 306 306 306	280 281 281 282 283 284 285 287 287 289 280 287 289 280 287 291 292 293 291 295 296 297 298 300 301 302 303 304 306 306 307 308 309 3111 3116 3116 3117 318 319 320 321 321 321 321 321 322 323 324 325 326 326 326 326 326 326 326 326 326 326	321 322 323 321 (1) 321 (2) 325 327 328 329 330 331 332 333 333 333 333 334 341 342 343 344 345 346 347 348 349 350 361 361 362 363 363 364 365 365 366 367 366 367 368 369 369 369 369 369 369 369 369

C

The Parsi Intestate Succession Act (XXI of 1865)

Sections of Act XXI of 1865	Sections of the new Act
1	50
2	51
3	52
4	53
5	54
6	55
7	55
8	29 (2) 31
First Schedule	Schedule II Part I
Second Schedule	Schedule II Part II

D

The Hindu Wills Act (XXI of 1870)

Sections of Act XXI of 1870	Sections of the new Act
236	57 213 (2) Sch III 57 Sch III Sch III

E

The Probate and Administration Act (V of 1881)

Sections of Act V of 1881	Sections of the new Act	Sections of Act V of 1881	Sections of the new Act
2 3 4 5 6 7 8 10 11 12 13	217 264 300 2 211 228 222 (1) 222 (2) 223 224 225 226 227 236 220	20 21 22 23 24 25 26 27 28 29 30 31	234 234 235 228 227 228 229 240 241 242 243 244 245
14 15 16 17 18	221 229 230 231 232	31 32 33 34 35 36 37	246 247 248 249 250

Sections of Act V of 1881	Sections of the new Act	Sections of Act V of 1881	Sections of the new Act
V of 1881  38 39 40 41 42 43 444 45 47 48 49 551 552 554 555 560 661 662 664 665 667 777 77 77 77 78 881 884 885 887	251 252 253 254 255 256 257 258 259 260 261 262 263 264 265 267 268 270 271 271 273 274 275 276 277 278 279 280 281 282 283 284 285 270 281 282 283 284 285 270 286 277 278 278 279 280 281 281 282 283 284 285 286 287 277 278 288 289 280 280 281 270 271 272 273 274 275 276 280 281 281 282 283 284 285 286 287 287 288 289 280 280 281 281 281 281 281 282 283 284 285 286 287 287 288 289 280 280 280 280 280 280 280 280 280 280	94 95 96 97 98 99 100 101 102 103 104 105 106 107 1108 110 1112 1113 1114 1115 1116 1116 1116 1117 1118 1119 120 121 122 122 123 125 125 126 127 128 129 129 129 129 129 129 129 129 129 129	313 314 315 316 317 318 319 320 321 322 323 325 326 327 328 329 330 331 332 333 334 335 335 336 337 338 339 340 341 342 342 343 344 344 346 346 346 347 348 349 350 351 352 353 355 355 355 355 355 355 355 355
87 A 87 B 88 89 90 90 A 90 B 91 92 93	300 301 302 305 306 307 308 309 310 311	144 145 145 A 146 A 146 147 149 150 152 154 157	364 365 366 367 368 369 391 217 215 57

The Succession Certificate Act (VII of 1889)

Sections of Act VII of 1889	Sections of the new Act
1 3 4 5 6 7 8 9 10 11 12 14 15 16 17 18 19 22 22 22 23 25 27 28	370 (1) 370 (2) 214 371 371 372 373 374 375 376 377 378 379 380 381 382 383 384 385 215 385 215 387
28	389
Sch II	Sch VIII

G

### The Native Christian Administration of Estates Act (VII of 1901)

Sections of Act VII of 1901	Sections of the new Act.
2 3 5	2 (d) 212 (2) 269 370 proviso

### COMPARATIVE TABLE II

## SHOWING SECTIONS OF THE NEW ACT CORRESPONDING TO THE SECTIONS OF THE OLD ACTS

Sections of the new Act	Sections of the old Acts	Sections of the new Act	Sections of the old Acts
1 2	S 1 Act X of 1865 S 3 Act X of 1865 S 2 Act VII of 1901 S 2 Act V of 1881	41 42 43 44	34 Act X of 1865 35 36
3	S 2 Act V of 1881 S 332 Act V of 1865 S 2 and Sch I Act VX\VIII of 1920	45 46 47	36 37 38 39 40
4 56 7 8 9	S 331 Act of 1865 S 5 Act X of 1865 6 7 8	48 49 50 51	41 42 1 Act XXI of 1865
10 11 12	9 10 11 12	52 53 54 55 56	2345
13 14 15 16	13 14 15 16	57 58 59 60 61	2 3 Act XXI of 1870 2 331 Act X of 1865 46 47 48
17 18 19 20	17 18 19 4 331 Act X of	62 63 64 65	49 50
21 22 23	2 Act III of 1874 44 Act X of 1865 45 331 331 Act X of 1865 8 Act \XI of 1865	66 67 68 69 70	51 52 53 54 55 56
24 25 26 27	20 Act X of 1865 21 22 23	71 72 73 74 75	56 57 58 59 60 61 62
27 28 29	24 2 331 Act X of 1865 8 Act XXI of 1865	76 76	64
30 31 32 33 33A	25 Act \ of 1865 8 Act \ XI of 1865 26 Act X of 1865 27 New	78 79 80 81 82	65 66 67 68 69
34 35 36 37 38 39	28 43 80 30 31 32 Act X of 1865	84 85 85 86 87 88	70 71 Act X of 1865 72 73 74 75
40	33 111 1 11 100	89	76

Sections of the new Act	Sections of the old Acts.	Sections of the new Act	Sections of the old Acts
90 91 92 93 94 95 96 97 98 99 100 102 103 104 105 106 117 118 119 111 111 111 111 118 119 120 121 123 124 125 126 127 128 129 130 131 131 131 131 131 132 133 134 135 135 135 135 135 135 135 135 135 135	77 Act X of 1865 78 79 80 81 82 83 84 85 86 87 99 90 91 92 93 94 95 96 97 100 100 100 101 101 102 103 104 105 105 107 108 111 112 113 114 115 116 116 117 118 119 120 121 122 123 124 125 126 127	150 151 152 153 154 155 155 156 156 156 160 161 162 163 164 165 166 166 166 167 177 173 174 176 177 178 179 181 182 183 184 185 187 188 188 188 187 189 190 191 192 193 194 196 197 198 199 200 200	137 Act X of 1865 138 139 140 141 142 143 144 145 146 147 148 149 150 151 152 153 154 155 166 167 168 169 177 178 178 172 172 173 174 175 1776 177 178 1 2 Act XIX of 1841 8 1 9 10 11
143 144 145 146 147	129 130 131 132 133 134	202 203 204 205 206 207	12 13 14 15 16

211 179 Act \ of 1865; 210 Act \ of 1865				
211   179   Act \( \) \( \) \( \) \( \) \( 1881 \)   210   Act \( \) \( \) \( \) \( 1881 \)   210   331   Act \( \) \( \) \( \) \( 1881 \)   211   227   Act \( \) \( \) \( \) \( \) \( 1881 \)   213   331   Act \( \) \( \) \( \) \( 1881 \)   212   228   Act \( \) \( \) \( \) \( 1881 \)   213   331   Act \( \) \( \) \( \) \( 1881 \)   214   229   Act \( \) \( \) \( \) \( 1881 \)   215   214   217   Act \( \) \( \) \( \) \( 1881 \)   217   Act \( \) \( \) \( \) \( \) \( 1881 \)   218   217   Act \( \) \( \) \( \) \( 1881 \)   218   217   Act \( \) \( \) \( \) \( 1881 \)   215   216   217   Act \( \) \( \) \( \) \( 1881 \)   215   216   217   Act \( \) \( \) \( \) \( 1881 \)   216   227   238   Act \( \) \( \) \( \) \( 1881 \)   217   247   248   247   248   248   248   249   248   249   248   249   248   249   248   249   249   248   249   2	Sections of the new Act	Sections of the old Acts.	Sections of the new Act	
212   213   331   Art \( \) of 1881   210   221   Art \( \) of 1885   28   Art \( \) of 1885   213   Art \( \) of 1895   222   Art \( \) of 1885   224   225   227   Art \( \) of 1885   224   227		179 Act \ of 1865:	239	26 Act V of 1881 210 Act 3 of 1865
1865   24	212	4 Act V of 1881		
213	2.2	1865 ı	211	28 Act V of 1881
2   Act \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \	213	187 331 Act \ of	212	1 212 Act X of 1865
211		2 Act \\\ \\ \ \ \ \ \ \ \ \ \ \ \ \ \ \ \	213	30 Act V of 1881
152	014	1903	211	31 Act V of 1881
216		152 Act V of 1881;	215	32 Act V of 1881
2 189 Act V of 1881 248 219 Act X of 1865 220 191 Act V of 1881 219 Act V of 1881 250 221 15 Act V of 1885 251 222 Act V of 1885 252 240 Act V o	216	260 Act \ of 1865;	216	33 Act V of 1881
221   15 Act V of 1881   251   238 Act V of 1881   252   222 Act V of 1885   252   222 Act V of 1885   253   222 Act V of 1885   254   255   222 Act V of 1885   255   225   2	217	Z 150 Act V of	247	217 Act \ af 1865 31 Act V of 1881 218 Act X of 1860
221   15 Act V of 1881   251   238 Act V of 1881   252   222 Act V of 1885   252   222 Act V of 1885   253   222 Act V of 1885   254   255   222 Act V of 1885   255   225   2	010	1881	248	35 Act V of 1881
221   15 Act V of 1881   251   238 Act V of 1881   252   222 Act V of 1885   252   222 Act V of 1885   253   222 Act V of 1885   254   255   222 Act V of 1885   255   225   2		200 to 207 Act X of 1 1865	249	36 Act V of 1881 220 Act V of 1865
221   15 Act V of 1881   251   238 Act V of 1881   252   222 Act V of 1885   252   222 Act V of 1885   253   222 Act V of 1885   254   255   222 Act V of 1885   255   225   2	220	14 Am 17 of 1001	250	37 Act V of 1881 221 Act V of 1865
181   182 Art X of   183   253   40 Art Y of   1881   253   40 Art Y of   1881   253   424 Art X of   1881   254   424 Art X of   1881   224   42 Art X of   1883   225   184   42 Art Y of   1881   255   226   42 Art Y of   1881   255   226   42 Art Y of   1881   225   22 Art X of   1885   226   227   228   42 Art X of   1885   227   428   428   428   43 Art Y of   1881   227   228   42 Art X of   1883   227   228   42 Art X of   1885   227   228   42 Art X of   1885   228   229   42 Art X of   1881   258   229   42 Art X of   1885   229   230   247   247   247   248   24	221	15 Act V of 1881 192 Act X of 1865	251	
223	222	6 7 Act V of 1881 181 182 Act X of	252	39 Act V of 1881 223 Act X of 1865
224 183 Act \ v of 1885 254 225 Act \ v of 1885 10 Act \ v of 1881 225 Act \ v of 1885 256 225 Act \ v of 1885 10 Act \ v of 1881 225 1185 Act \ x of 1885 255 225 Act \ v of 1885 126 Act \ x of 1885 225 Act \ v of 1881 225 Act \ v of 1881 225 Act \ v of 1881 226 Act \ v of 1881 226 Act \ v of 1881 226 Act \ v of 1881 227 Act \ v of 1881 227 Act \ v of 1881 227 Act \ v of 1881 228 Act \ v of 1881 229 Act		1865 8 Act V of 1881	253	40 Act V of 1881 224 Act X of 1865
225		183 Act \ of 1865	254	41 Art V of 1881
225		184 Act X of 1865	255	42 Act V of 1881 226 Act X of 1865
12 Act V of 1881   227   228 Act X of 1865     5 Act V of 1881   258   45 Act V of 1881     180 Act X of 1885   259   46 Act V of 1881     129 Act V of 1881   259   46 Act V of 1881     120 Act V of 1881   259   46 Act V of 1881     120 Act V of 1881   259   47 Act V of 1881     121 Act V of 1881   260   231 Act X of 1865     122 Act X of 1865   261   222 Act X of 1865     123 Act X of 1865   263   223 Act X of 1865     124 Act X of 1865   263   264   265     125 Act X of 1865   265   265     126 Act X of 1865   266   267 Act V of 1881     127 Act V of 1881   268   267 Act V of 1881     128 Act X of 1865   268   268     129 Act X of 1865   268   268     120 Act X of 1865   268     120 Act X	-	185 Act X of 1865	256	43 Act V of 1881 227 Act X of 1865
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18 Act V of 1881, 261 232 Act X of 1865, 232 195 Act X of 1865, 232 233 Act X of 1865, 253 Act X of 1865, 253 Act X of 1865, 254 Act X of 1865, 255 Act X of 1861, 255 Act X of 1865, 255 Act X of 1861, 255 Act X of 1861, 255 Act X of 1865, 255 Act X of 1861, 255 Act X of 1865, 25	229	193 Act 3 of 1865	1	47 Act V of 1881
231 195 Act X of 1865; 19 Act V of 1881, 232 196 Act X of 1865; 233 197 Act V of 1881, 233 197 Act V of 1881, 24 C V of 1881, 25 234 198 Act X of 1865; 234 198 Act X of 1865; 235 Act Y of 1861, 236 237 Act X of 1865; 24 C V of 1881, 25 199 Act X of 1865; 25 Act Y of 1881, 25 199 Act X of 1865; 26 187 Act Y of 1865; 27 Act Y of 1881, 28 199 Act X of 1865; 29 Act Y of 1881, 29 Act X of 1865; 21 Act Y of 1881, 21 Act Y of 1881, 22 Act Y of 1881, 237 208 Act X of 1865; 25 Act Y of 1881, 24 Act X of 1865; 25 Act Y of 1881, 25 Act Y of 1881, 26 Act X of 1865, 27 Act Y of 1881, 28 Act X of 1865, 29 Act X of 1865, 20 Act X of 1865, 20 Act X of 1865, 20 Act X of 1865, 21 Act Y of 1881, 21 Act Y of 1881, 22 Act Y of 1881, 237 208 Act X of 1865, 25 Act Y of 1881, 25 Act Y of 1881, 26 Act X of 1865, 27 Act Y of 1881, 28 Act X of 1865, 28 Act X of 1865, 28 Act X of 1865, 29 Act X of 1865, 20 Act X of 1865, 20 Act X of 1865, 20 Act X of 1865, 21 Act Y of 1881, 21 Act Y of 1881, 21 Act Y of 1881, 22 Act Y of 1881, 23 Act Y of 1881, 24 Act Y of 1881, 25 Act Y of 1881, 26 Act X of 1865, 27 Act Y of 1881, 28 Act X of 1865, 29 Act X of 1865, 20 Act X of 1865, 21 Act Y of 1881, 21 Act Y of 1881, 22 Act Y of 1881, 23 Act Y of 1881, 24 Act Y of 1881, 25 Act Y of 1881, 26 Act X of 1865, 26 Act X of 1865, 27 Act Y of 1881, 28 Act X of 1865, 29 Act X of 1865, 20 Ac	230	194 Act X of 1865		48 Act V of 1881
233 Act V of 1881 263 234 Act V of 1885 251 Act V of 1885 254 Act V of 1881 235 Act V of 1881 255 Act V of 1881 255 Act V of 1881 255 Act V of 1885 254 255 Act V of 1885 255	231	195 Act X of 1865	1	49 Act V of 1881
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13 Act V of 1881   52 Act V of 1881   53 Act V of 1881   53 Act V of 1881   53 Act V of 1881   54 Act X of 1865   266   226 Act X of 1805   255 Act V of 1881   54 Act X of 1805   54 Act V of 1881   55	233	197 Act X of 1865		
13 Act V of 1881   52 Act V of 1881   53 Act V of 1881   53 Act V of 1881   53 Act V of 1881   54 Act X of 1865   266   226 Act X of 1805   255 Act V of 1881   54 Act X of 1805   54 Act V of 1881   55	234	198 Act 3 of 1865	204	2 and Sch I Act
236   189 Act X of 1865   2 Act VI of 1881   53 Act V of 1881   53 Act V of 1881   53 Act V of 1881   54 Act X of 1865   266 Act X of 1865   266 Act X of 1865   54 Act V of 1881   54 A	2,35	199 Act X of 1865	265	235A Act X of 1865
237 288 Act X of 1865 266 236 Act X of 1805 25 Act V of 1881 54 Act V of 1881	236	189 Act X of 1865		2 Act VI of 1881
	2.37	208 Act X of 1865	266	236 Act X of 1881
	238		267	237 Act X of 1865

Sections of the new Act	Sections of the old Acts.	Sections of the new Act	Sections of the old Acts
268	55 Act V of 1881	287	253B Act X of 1865
269	238 Act \ of 1865 3 Act VII of 1901		74 Act V of 1881 7 Act VI of 1881
270	239 Act X of 1865 56 Act V of 1881	288	253C Act X of 1865 75 Act V of 1881
271	240 Act X of 1865 57 Act V of 1881	289	7 Act VI of 1881 254 Act X of 1865
272	241 Act X of 1865 241A Act X of 1865		76 Act V of 1881 8 9 Act VI of 1881
	58 Act V of 1881 3 Act VI of 1881	290	255 Act X of 1865 77 Act V of 1881
273	242 Act X of 1865 59 Act V of 1881		8 9 Act VI of 188 5 13 Act VI of 188
	2 (2) & 3 (1) Act VIII of 1903	291	256 Act X of 1865 78 Act V of 1881
274	242A Act Y of 1865 60 Act V of 1881	292	6 Act VI of 1889 257 Act X of 1865 79 Act V of 1881
	2 (3) & 3 (2) Act VIII of 1903	293	258 Act X of 1865
275	61 Act V of 1881 243 Act X of 1865 62 Act V of 1881	294	80 Act V of 1881 259 Act X of 1865 81 Act V of 1881
276	62 Act V of 1881 244 Act % of 1865 2 (4) & 3 (3) Act	295	261 Act V of 1865 83 Act V of 1881
	VIII of 1903 3 Act VI of 1889	296	333 Act X of 1865 157 Act V of 1881
277	4 Act VI of 1881 63 Act V of 1881	297	10 17 Act VI of 1889 262 Act X of 1865
278	245 Act X of 1865 2 (4) & 3 (3) Act	298	84 Act V of 1881 85 Act V of 1881
215	VIII of 1903	299	263 Act X of 1865 86 Act V of 1881
	64 Act V of 1881 4 Act VI of 1881	300	264 Act X of 1865 8 87 Act V of 1881
279	65 Act V of 1881 246A Act X of 1865		2 and Sch I Act XXVIII of 1920
	2 (5) Act VIII of 1903	301	264A Act X of 1865 87A Act V of 1881
280	247 Act \ of 1865 66 Act V of 1881 248 Act X of 1865	200	Sch I Act XVIII of
281 282	248 Act X of 1865 67 Act V of 1881 249 Act X of 1865	302	264B Act X of 1865 87B Act X of 1881 Sch I Act XVIII of
283	68 Act V of 1881 250 Act V of 1865	303	1919
200	69 Act V of 1881 9 Act VI of 1881	304 305	265 Act X of 1865 266 Act X of 1865 267 Act X of 1865
	2 (6) & 3 (4) Act VIII of 1903	306	88 Act V of 1881 268 Act X of 1865 89 Act V of 1881
284	251 252 Act X of 1865	307	269 Act \(\lambda\) of 1865
	70 71 Act V of 1881 5 Act VI of 1881		90 Act V of 1881 14 Act VI of 1889
285	253 Act X of 1865 72 Act V of 1881 6 Act VI of 1881	008	269A Act X of 1865 90A Act V of 1881 Sch I Act XVIII of
286	253A Act X of 1881 73 Act V of 1881	309	1313
	7 Act VI of 1881	305	269B Act V of 1865 90B Act V of 1881

Sections of the new Act	Sections of the old Acts	Sections of the new Act	Sections of the old Acts
	Sch I Act VIII of	336	290 Act X of 1865
310	270 Act % of 1865	337	116 118 Act V of 1881 297 Act X of 1865
311	91 Act V of 1881 271 Act X of 1865	000	117 147 Act V of 1881
	92 Act V of 1881	338	298 Act X of 1865 118 Act V of 1881
312	272 Act \( \lambda \) of 1865 93 Act \( \lambda \) of 1881	339	299 Act X of 1865
313	273 Act X of 1865	340	300 Act % of 1865
314	94 Act V of 1881 274 Act A of 1865	041	120 Act V of 1881
	95 Act V of 1881	341	301 Act X of 1865 121 Act X of 1881 302 Act X of 1865
315	275 Act X of 1865 96 Act V of 1881	312	302 Act X of 1865 122 148 Act V of 1881
316	276 Act A of 1865	343	303 Act X of 1865
317	97 Act V of 1881 277 Act X of 1865	344	
(	98 Act V of 1881		124 148 Act V of 1881
318	7 15 Act VI of 1889	315 346	305 Act \ of 1865 306 Act \ of 1865
1	277A Act X of 1865 99 Act V of 1881		125 Act V of 1881
	16 Act VI of 1889 2 (7) Act VIII of	347	307 Act X of 1865 126 148 Act V of 1881
010	1903	348	308 Act A of 1865
319	278 Act % of 1865 100 Act V of 1881		127 Act V of 1881 8 Act VI of 1881
920	279 Act X of 1865	349	309 Art 3 of 1865
321	280 Act X of 1865	350	128 Act V of 1881 310 Act X of 1865 129 Act V of 1881
322	102 Act V of 1881 281 Act X of 1865	351	129 Act V of 1881 311 Act X of 1865
	103 Act V of 1881		130 Act V of 1881
323	282 Act X of 1865 104 Act V of 1881	352	312 Act X of 1865 131 Act V of 1881
324	283 284 Act X of	353	313 Act X of 1865
	1865 9 Act VI of 1889	354	132 Act V of 1881 314 Act \ of 1865
325	285 Act X of 1865 105 Act V of 1881		133 Act V of 1881
326	286 Act X of 1865	355	134 Act V of 1881
327	106 Act V of 1881 287 Act X of 1865	35b	
	107 Act V of 1991	357	ner Ass Y of 1800
328	288 Act X of 1865 108 Act V of 1881	358	136 148 Act V of 1881 318 Act X of 1865
329	268 Act X of 1865 109 Act V of 1881		137 148 Act V of 1881
330	290 Act X of 1865	359	120 149 Act V of 1881
331	110 Act V of 1881 291 Act X of 1865	360	320 Act X of 1865 139 Act V of 1881
	111 Act V of 1881	361	321 Act X of 1865
332	292 Act X of 1865 112 148 Act V of 1881	362	140 148 Act V of 1881 322 Act X of 1865
333	293 Act X of 1865 113 148 Act V of 1881		141 Act V of 1881
334	294 Act X of 1865	363	142 Act V of 1881
335	114 148 Act V of 1881 295 Act X of 1865	364	324 Act X of 1865 143 Act V of 1881
<b></b> 5	115 148 Act V of 1881	365	325 Act X of 1865 144 Act V of 1881

Sections of the new Act	Sections of the old Acts.	Sections of the new Act	Sections of the old Acts
366	326 Act \ of 1865 145 Act V of 1881	7 376 377	10 Act VII of 1889
367	326A Act X of 1865	378	12
	145A Act V of 1881	879	14
	9 16 Act II of 1890	380	15
368	327 Act \ of 1865	HBI	16
	146 Act V of 1881	382	17
369	328 Act X of 1865	383	18
	147 Act V of 1881	384	19
370	1 (4) & 3 (2) Act	385	20
	VII of 1889	386	20
	5 Act VII of 1901	387	25
371	5 Act VII of 1889	388	26
372		389	27
373		390	28
374 375	6 7 8 9	391	149 Act V of 1881

# **ABBREVIATIONS**

# (English Reports)

ΛC	Law Reports Appeal Cases.
Λdd	fallen trefores replicat cares.
	Addam's l'eclesiastical Reports,
A&E	Adolphus and Lilis Reports Lings Bench
Amb	Ambler 4 Reports Chancery
Anst	Anstruther & Reports Exchequer
Atk	Atkyns Reports Chancery
	Delland Destant Description
Ball & B	Ball and Beatty's Reports (Ireland)
Barn Ch	Barnardiston's Reports Chancers
B & Ad B & Ald	Barnewall and Adolphus Reports King s Bench Barnewall and Alderson's Reports King's Bench
B & Ald	Barnewall and Alderson's Reports King's Bench
B&C	Barnewall and Cresswell's Reports King's Bench
8 & 5	Best and Smith's Reports Queen's Bench
	Personal Breasts Police Country Depth
Beav	Beavan's Reports Rolls Court
Bing	Bingham's Reports Common Pleas
Bing N C	Bingham's New cases Common Pleas.
Blı	Bligh's Reports House of Lords,
B&P	Bosanquet and Puller's Reports, Common Pleas.
Boul	Boulnois Reports.
	Paud of Perote
Bourke	Bourke's Reports.
Br C C Br P C	Brown & Chancers Cases,
Br P C	Brown's Parliamentary Crees
Brow & Lush	Browning and Lushington's Reports
Burr	Burrov 9 Reports Lings Bench
Camp_	Campbell s Reports.
C & P	Carrington and Payne's Reports Nisi Prius
Carth	Carthew's Reports King's Bench
Can down I as	
Cas. temp Lee	Cases in the time of Lee
	Taibot
Cl & Fin	Clarke and Finnelly's Reports House of Lords.
Cl & Fin	Clarke and Finnelly 8 Reports House of Lords. Common Bench Reports.
Ci & Fin C. B C B (N S)	Clarke and Finnelly s Reports House of Lords.
Cl & Fin C B C B (N S) C P	Clarke and Finnelly 8 Reports House of Lords. Common Bench Reports.
Ct & Fin C. B C B (N S) C P	Clarke and Finnelly a Reports House of Lords. Common Bench Reports. Common Bench New Series. Common Pleas
Ch D	Clarke and Finnelly 8 Reports House of Lords. Common Bench Reports. Common Pleas Common Pleas Law Reports Chancery Dission
Ch B Ch R	Clarke and Finnelly 8 Reports House of Lords. Common Bench Reports. Common Bench New Series. Common Pleas Law Reports Chancery Dissison Reports in Chancery
Ch B Ch R Coll	Clarke and Finnelly a Reports House of Lords. Common Bench Reports. Common Pleas Law Reports Chancery Division Reports in Chancery Collyers, Reports Chancery
Ch B Ch R Coll	Clarke and Finnelly a Reports House of Lords. Common Bench Reports. Common Bench New Series. Common Pleas Law Reports. Chancery Dissision Reports in Chancery Collyers Reports Chancery Collyers Reports Chancery Collyers Reports Chancery Colleges Reports
Ch D Ch R Coll Co Rep C P D	Clarke and Finnelly a Reports House of Lords. Common Bench Reports. Common Pleas Law Reports Chancery Division Reports in Chancery Collyers Reports Chancery Coles Reports Law Reports New Series Common Pleas Law Reports Law Reports New Series Common Pleas Division
Ch B Ch R Coll Co Rep C P D Cawp	Clarke and Finnelly, a Reports House of Lords. Common Bench Reports. Common Bench New Series. Common Pleas Law Reports. Chancery Disision Reports in Chancery Collyers Reports Chancery Coles Reports Law Reports New Series Common Pleas Division Cowper's Reports, Ning's Bench
Ch B Ch R Coll Co Rep C P D Cawp	Clarke and Finnelly a Reports House of Lords. Common Bench Reports. Common Bench New Series. Common Pleas Law Reports Chancery Dissision Reports in Chancery Collyers Reports Chancery Collyers Reports Chancery Law Reports New Series. Law Reports New Series Common Pleas Division Cowpers Reports, Sings Bench Cow Seports Chancery
Ch B Ch R Coll Co Rep C P D Cawp	Clarke and Finnelly, a Reports House of Lords. Common Bench Reports. Common Bench Reports. Common Pleas Law Reports. Chancery Dissision Reports in Chancery Collyers Reports Chancery Collyers Reports Chancery Colves Reports New Series Common Pleas Division Cowpers Reports Aings Bench Cova Reports Chancery Cova Reports Chancery Cova Reports Chancery Craw and Phillips. Proports. Chancery Craw and Phillips. Proports. Chancery
Ch B Ch R Coll Co Rep C P D Cawp	Clarke and Finnelly, a Reports House of Lords. Common Bench Reports. Common Bench Reports. Common Pleas Law Reports. Chancery Dissision Reports in Chancery Collyers Reports Chancery Collyers Reports Chancery Colves Reports New Series Common Pleas Division Cowpers Reports Aings Bench Cova Reports Chancery Cova Reports Chancery Cova Reports Chancery Craw and Phillips. Proports. Chancery Craw and Phillips. Proports. Chancery
Ch B Ch R Coll Co Rep C P D Cawp	Clarke and Finnelly, a Reports House of Lords. Common Bench Reports. Common Bench Reports. Common Pleas Law Reports. Chancery Dissision Reports in Chancery Collegers Reports Chancery Coles Reports Sussion Law Reports New Series Common Pleas Division Cowpers Reports Aings Bench Cox & Reports Aings Bench Cox & Reports Chancery Craig and Philips Reports Chancers Craig and Philips Reports Exchequer Comption and Jervis Reports Exchequer Comption and Jervis Reports Exchequer Comption and Jervis Reports Exchequer
Ch B Ch R Coll Co Rep C P D Cawp	Clarke and Finnelly, a Reports House of Lords. Common Bench Reports. Common Bench Reports. Common Pleas Law Reports. Chancery Dissision Reports in Chancery Collegers Reports Chancery Coles Reports Sussion Law Reports New Series Common Pleas Division Cowpers Reports Aings Bench Cox & Reports Aings Bench Cox & Reports Chancery Craig and Philips Reports Chancers Craig and Philips Reports Exchequer Comption and Jervis Reports Exchequer Comption and Jervis Reports Exchequer Comption and Jervis Reports Exchequer
Ch D Ch R Coll Co Rep C P D Covp Cr & Ph C & M C & M C M & R	Clarke and Finnelly s Reports House of Lords. Common Bench Reports. Common Bench Reports. Common Pleas Law Reports Chancery Division Reports in Chancery Collyers Reports Chancery Coles Report Chancery Coles Reports New Series. Cowpers Reports New Series Cowpers Reports Namery Cowpers Reports Namery Construction Comparis The Common Pleas Division Cowpers Reports Namery Common Division Comparis The Common Pleas Division Comparis The Common Pleas Reports Exchequer Crompton and Jerus Reports Exchequer Crompton and Messon's Reports Exchequer Crompton Messon & Reports Exchequer Crompton Messon & Recovers Reports Exchequer
Ch D Ch D Ch R Coll Co Rep C P D Cowp Cor Cr & Ph C & J C & M C M & R Cro Eliz	Clarke and Finnelly, a Reports House of Lords. Common Bench Reports. Common Bench Reports. Common Pleas Law Reports Chancery Division Reports in Chancery Collegers Reports Chancery Coles Reports Chancery Covers Reports New Series Common Pleas Division Cowpers Reports Chancery Crowpers Reports Chancery Craig and Phillips Reports Chancers Crompton and Jervis Reports Exchequer Crompton and Meesons Reports Exchequer Crompton Meeson & Roccoes Reports Exchequer Crofes Reports (Elizabeth)
Ch D Ch R Coll Co Rep C P D Cove Cove Cove Cove Cove Cove Cove Cove	Clarke and Finnelly s Reports House of Lords. Common Bench Reports. Common Bench Reports. Common Pleas Law Reports Chancery Division Reports in Chancery Colleges Reports Chancery Coles Reports Chancery Covers Reports Chancery Cowpers Reports Common Pleas Division Cowpers Reports Name Sentes Cowpers Reports Francery Covers Reports Covers Cover
Ch D Ch R Coll R Coll R Cor R Cor P Cor P Cor & P Cor & M Cor M Cor S Co	Clarke and Finnelly a Reports House of Lords. Common Bench Reports. Common Bench Reports. Common Bench New Series. Common Pleas Law Reports Chancery Dissison Reports in Chancery Collyers Reports Chancery Law Reports Chancery Collyers Reports Chancery Cova Reports New Series Common Pleas Division Cowpers Reports New Series Common Pleas Division Cova Reports New Series Common Pleas Division Cova Reports New Series Common Pleas Cova Reports New Series Crompton and Jerus Reports Exchequer Crompton and Jerus Reports Exchequer Crompton Miceson & Reports Exchequer Crompton Miceson & Reports Exchequer Crompton Alleson & Reports Exchequer Crompton Miceson & Reports Exchequer Crompton Series Common Miceson & Reports Exchequer Crompton Common Miceson & Reports Exchequer Crompton Series Common Miceson & Reports Exchequer Crompton Miceson & Reports Exchequer Common Miceson & Repo
Ch D Ch R Coll R Coll R Cor R Cor P Cor P Cor & P Cor & M Cor M Cor S Co	Clarke and Finnelly a Reports House of Lords. Common Bench Reports. Common Bench Reports. Common Pleas Law Reports Chancery Division Reports in Chancery Cole's Reports Chancery Cole's Report Chancery Cole's Report Chancery Cowper's Report Sendery Cowper's Report Sendery Campain Aphilips Reports Chancery Craig and Philips Reports Exchequer Compton and Meecon Chancery Compton and Meecon Reports Exchequer Compton and Meecon Reports Exchequer Compton and Meecon Reports Exchequer Crofe's Reports (Enzabeth)
Ch D Ch R Coll R Coll R Cor R Cor P Cor P Cor & P Cor & M Cor M Cor S Co	Clarke and Finnelly s Reports House of Lords. Common Bench Reports. Common Bench Reports. Common Bench New Series. Common Pleas Law Reports Chancery Division Reports in Chancery Colleges Reports Chancery Colleges Reports Chancery Colleges Reports Chancery Colleges Reports New Series. Cow a Report New Series. Cow a Report Series Common Pleas Division Cow Series Chancery Craig and Phillips Reports Chancery. Crompton and Jervis Reports Exchequer Crompton and Jervis Reports Exchequer Crompton Ameson & Reports Exchequer Cromles Reports (Ehrabeth) Croles Reports (Ehrabeth) Croles Reports (James Uts Decom Colleges Reports
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CH P CH P COURTE COURT COPD CAMP COX	Clarke and Finnelly a Reports House of Lords. Common Bench Reports. Common Bench Reports. Common Pleas Law Reports Chancery Division Reports in Chancery Coley Reports Chancery Coley Reports Chancery Cover Reports Chancery Cover Reports New Series Common Pleas Division Cowper's Reports Chancery Crompton Aphilips Reports Chancery Craig and Phillips Reports Chancery Crampton and Meevons Reports Exchequer Crompton and Meevons Reports Exchequer Crombton Meeson & Roccoe's Reports Crowles Reports (Chancell) Curvis Ecclesiastural Reports Deacon and Chuty's Reports Deacon Reports
Cfi D Ch R Coil R Col Rep Cor & P D Cor & P I Cor & P I Cor & M Cor & Elix Cro Elix Cro Jac Cort & C DeG & J DeG M & G Deg & S	Clarke and Finnelly a Reports House of Lords. Common Bench Reports. Common Bench Reports. Common Pleas Law Reports Chancery Division Reports in Chancery Cole's Reports Law Reports Chancery Cover a Reports Law Reports Nancery Cover a Report Seports Law Reports Nancery Cowper's Reports Chancery Cray and Phillip a Reports Chancer Cray and Phillip a Reports Chancer Cray and Phillip a Reports Exchequer Crompton and Meevons Reports Exchequer Crompton and Meevons Reports Exchequer Crompton and Meevons Reports Crofe's Reports Chancery Covers Reports Decor and Chattys Reports Decor & Jones Reports Decor Macnaghten and Gordon's Reports DeCer Macnaghten and Gordon's Reports DeGer Managhten and Gordon's Reports DeGer Managhten and Gordon's Reports DeGer Managhen and Gordon's Reports DeGer Managhen and Gordon's Reports DeGer Almale's Reports Chancery
CH P CH P COURTE COURT COPD CAMP COX	Clarke and Finnelly s Reports House of Lords. Common Bench Reports. Common Bench Reports. Common Bench Reports. Common Pleas Law Reports Chancery Division Reports in Chancery Coles Reports Chancery Cover a Report September of Common Pleas Law Reports New Series. Cowpers Reports Chancery Cowpers Reports Chancery Cowpers Reports Reports Exchequer Crompton and Jerus Reports Exchequer Crompton and Jerus Reports Exchequer Crompton and Jerus Reports Exchequer Crompton and Meeson's Reports Exchequer Crofe's Reports (Elizabeth) Croke's Reports (James 1) Curtus Ecclessatical Reports Decom and Chitty's Reports Decom Adamaghies Decom Fache and Jone Decom Reports Chancery Decom Reports Chancery
Cfi D Ch R Coil R Col Rep Cor & P D Cor & P I Cor & P I Cor & M Cor & Elix Cro Elix Cro Jac Cort & C DeG & J DeG M & G Deg & S	Clarke and Finnelly a Reports House of Lords. Common Bench Reports. Common Bench Reports. Common Bench Reports. Common Pleas Law Reports Chancery Division Reports in Chancery Cole's Reports Law Reports Chancery Cover's Reports Law Reports Chancery Cover's Reports Law Reports Name Series Cowper's Reports Law Reports Chancery Crang and Phillip a Reports Crang Exchequer Crompton and Meevons Reports Exchequer Crompton and Meevons Reports Exchequer Crompton and Meevons Reports Crompton Series Cordes Reports (Chancery Crompton Chantery Crompton Chantery Deacon Control Chancery Deacon Control Chancery Deacon Chantery Decker Alphar and Jones Decker Macnaghten and Gordon's Reports Decker Alphar and Jones Decker Alphar and Jones Decker Alphar and Jones Decker Alphar and Jones Decker Alphar and Gordon's Reports Decker Reports Chancery Drodens Reports Queen Bench
Cfi D Ch R Col Rep Cor Epp Cor Eph Col Eliz Cor Eliz Cor Jac Cor Jac Cor Jac Cor Jac Cor Jac Cor Jac Cor M Cor & J DeG & J DeG & J DeG & J DeG & J DeG & J DeG & S Deg & S Deg & S Deg & S	Clarke and Finnelly s Reports House of Lords. Common Bench Reports. Common Bench Reports. Common Bench Reports. Common Pleas Law Reports Chancery Division Reports in Chancery Coles Reports Chancery Cover a Report September of Common Pleas Law Reports New Series. Cowpers Reports Chancery Cowpers Reports Chancery Cowpers Reports Reports Exchequer Crompton and Jerus Reports Exchequer Crompton and Jerus Reports Exchequer Crompton and Jerus Reports Exchequer Crompton and Meeson's Reports Exchequer Crofe's Reports (Elizabeth) Croke's Reports (James 1) Curtus Ecclessatical Reports Decom and Chitty's Reports Decom Adamaghies Decom Fache and Jone Decom Reports Chancery Decom Reports Chancery
Cfi R Coll Rep Cor P D Cowp Cox	Clarke and Finnelly a Reports House of Lords. Common Bench Reports. Common Bench Reports. Common Bench New Series. Common Plean Law Reports Chancery Dissison Reports in Chancery Collyers Reports Chancery Collyers Reports Chancery Collyers Reports Chancery Claw Reports New Series Common Pleas Division Cows Reports New Series Common Pleas Division Cows Reports New Series Common Pleas Division Cows Reports New Series Chancery Crang and Phillips Reports Exchequer Crompton and Jervis Reports Exchequer Crompton and Jervis Reports Exchequer Corbes Reports (Chancers) Corbes Reports (Chancers) Corbes Reports (Chancers) Cortis Ecclesiastical Reports Decar Series Chancery Decar Series Chancers Dowlings Reports Dowlings Reports Dowlings Reports Dowlings Reports Dowlings Reports Dowlings Reports
CH R COURPE CON Rep CO P D COWP CO P D COWP CO E M	Clarke and Finnelly a Reports House of Lords. Common Bench Reports. Common Bench Reports. Common Bench New Series. Common Plean Law Reports Chancery Dissison Reports in Chancery Collyers Reports Chancery Collyers Reports Chancery Collyers Reports Chancery Claw Reports New Series Common Pleas Division Cows Reports New Series Common Pleas Division Cows Reports New Series Common Pleas Division Cows Reports New Series Chancery Crang and Phillips Reports Exchequer Crompton and Jervis Reports Exchequer Crompton and Jervis Reports Exchequer Corbes Reports (Chancers) Corbes Reports (Chancers) Corbes Reports (Chancers) Cortis Ecclesiastical Reports Decar Series Chancery Decar Series Chancers Dowlings Reports Dowlings Reports Dowlings Reports Dowlings Reports Dowlings Reports Dowlings Reports
Cfi R Call R Call R Call R Carp Carp Cr & Ph Cr & Ph C & M Cro Eliz Cro Jac Cro Jac Cro F Cro Jac Dr & E Dr & F Dr & F Dr & F Dr & F Dr & B DR	Clarke and Finnelly s Reports House of Lords. Common Bench Reports. Common Bench Reports. Common Bench Reports. Common Pleas Law Reports Chancery Division Reports in Chancery Collers Reports Chancery Collers Reports Chancery Cowpers Reports Chancery Cowpers Reports Chancery Cowpers Reports Chancery Cowpers Reports Aing s Bench Craig and Philips Reports Chancery Crompton and Jerus Reports Exchequer Crofes Reports (Elizabeth) Crokes Reports (James 1) Curtus Ecclessastical Reports Decor Labert and Cordon s Reports Decor Labert and Cordon s Reports Decor Laber and Jona Reports Decor Laber and Smale s Reports Decless Reports Chancery Douglas Reports Queen s Bench Dow and Clarks Reports

Dr & Sm. Dr & War Durn, & East Durn. & East
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Drewry and Smale's Reports Chancery Drewry and Warren's Chancery Reports (Ireland) Durn'o d and Last or Term Reports Last's Reports King Bench, F den s Reports.

F llis and Blackburn's Reports Queen's Bench
Fllis, Blackburn and Ellis Reports Queen's Bench Files and I lls Reports Oueen's Bench Fquity Reports. Equity Cases Abridged Espinasse s Reports. Exchequer Reports Law keports Excl equer Division Finch's Reports. Foster and Finlason's Reports Ness Prius. Freeman's Reports Chancery Giffard & Reports Chancery Haggard's Feelesiastical Reports. Hare's Reports, Chancery Henry Blackstone's Reports Common Pleas. Henry Blackstone's Reports Common Fleat.
Hermanig and Miller's Reports.
Hurstone and Coltman's Reports.
Harn on and Wallaston's Reports.
Hurstone and Norman's Reports Exchequer
Law Reports House of Lords Cases
Holts Equity Reports Holts Nisi Prius Reports Indiana Reports. Insh Equity Reports. Insh Reports. Jacob s Reports. Jacob and Walker's Reports Chancery Johnson and Hemming's Reports Chancery Sir William Jones Reports, Jones and Latouche's Reports (Ireland) Junst Reports Law Reports, Ling's Bench Division kay s Reports kay and Johnson's Reports Chancery heen's Reports Rolls Court hnapp's Reports Privy Council Leonard's Reports Ling's Bench Law Journal Reports (New Series) Probate and Matrimonial

Chancery
Law Reports Chancers
Equity Cases
Exchequer House of Lords Cases Privy Council Probate and Divorce Cases Queen's Bench Cases

Law Times Reports Levenz's Reports King's Bench Mylne and Craig's Reports Macnaghten and Gordon's Reports
Macqueen's Appeal Cases (Scot )
Manning and Granger's Reports Common Pleas
Manning and Ryland's Reports Maining and Kene s Reports
Mylne and Kene s Reports
Moore and Payne s Reports
Maule and Selwyn s Reports
Meeson and Welsby s Reports
Maddock s Reports Chancery Merivale's Reports Chancery

Mod Mont Mood Moo P C N & M N & P Notes of Cas P Wms PĎ Pea N P Ph Phillim Prec Ch P Q B Q B D R & M RR Rob Roll Ren Russ Russ & M Sch & Lef Salk Saund S L C Sel Ca Ch Sım Sim & St Sm & Giff Stark Style Swan Sw & Tr Taunt T R Vaugh Ventr Vern Ves. Ves. Sen
Ves. Sen
Ves. & B
W R (Eng)
W & T L C
W Bl
Willes
Y & C
Y & C Ex
Y & J

Modern Reports King's Bench Montague s Reports Moody's Chancery Cases Moore's Privy Council Reports Neville and Manning s Reports Neville and Perry's Reports Notes of Cases in Ecclesiastical Courts Peere Williams Reports Chancery Law Reports New Series Probate Division Peake s Nisi Prius Reports Philip's Reports Chancery Phillimore's Reports Ecclesiastical Precedents in Chancery Probate (Law Reports) Adolphus and Ellis Queen's Bench Reports Law Reports Queen's Bench Division Russel and Mylne's Reports Chancery Revised Reports Robertson s Ecclesiastical Reports Rolle s Reports Russell's Reports Chancery Russell and Mylne's Reports Chancery Schoales and Lefroy's Reports Salkeid's Reports Ling's Bench Saunder's Reports Smith's Leading Cases Select Cases in Chancery Simon a Reports Chancery Simon and Stuart's Reports Smale and Giffard's Reports Starkie's Reports Statistics reports King's Bench Swanston's Reports Chancery Swabey & Tristram's Reports Probate and Divorce Taunton's Reports Common Pleas Taunton s Reports
Terms Reports
Vaughan's Reports Common Pleas
Ventrus Reports Ling's Bench
Vernon's Reports Chancer,
Vesey's (Jumor) Reports Chancery
Vesey's (Semior) Reports Chancery
Vesey and Beame's Reports
Wastly Reporter (English) Vessy and Beames Reports
Weekly Reporter (English
White and Tudors Leading Cases
William Blackstones Reports
Willes Reports Lings Bench & Common Pleas.
Young and Collyer's Exchequer
Young and Collyer's Exchequer
Young and Jeris Reports Exchequer

#### TABLE OF CASES

NB -The referen es are to the number of Notes and not to the number of pages

#### ENGLISH, IRISH AND AMERICAN CASES

ENGLISH, IRISH
Abbot v Massie 83 167

— V Middleton 81 82 85A 86 92
Abram v Cunninpham 313
Acheties v Jernon 148.
Adams v Jones 81
Adamson in the goods of 78
Adamson in the goods of 78
Adamson in the goods of 78
Adamson v Airmitage 185
Agnew v Belfast Banking Co 208
Aikman v Airman 14
Allan v Morrison 76
Allen v Dundas, 312
Allen v McPherson 45
Andrews v Partungton 123
Angerstein v Martin 388
Anonymous, 258 314 352
Applebee In the goods of 72
Archer v Hudson 49
Armold v Armold 10
Ashburner v M Guire 175
Ashton v Adamson 185
Altens v Hiccocks, 139
Altens v Hiccocks, 139
Altens v Hiccocks, 139
Altens v Hiccocks, 139
Altens v Home Solomon 381
Att.-Genl Walthews 97

— v Rows 15

— v Whorwood 97
Attwaler v Adams 162

Attely in Vard 182 - V. Kore 15

- V. Whorwood 97

Attwater V. Attwater 162

Avrey V. Hill 42

Ayrey V. Hill 42

Backhouse Re 378

Badnot V. Stevens 174

Bagot Re 119

Baley In the goods of 55

Baker Brooks 334

- V. Russell 341

- In the goods of 260

Banks V. Goodfellow 43

Barnets V. Bannister 43

Barber V. Barber 109

Barnet V. Barber 109

Barnet V. Barber 109

Barnet V. Butter 384

Barnet V. Barber 109

Barnet V. Butter 385

Barry V. Butter 385

Barry V. Butter 385

Barry V. Butter 387

Basett S Estate Re 111

Bathurst V. Hill poofs of 248

Beachtord V. Beachtroft 110

Beau V. Griffiths, 150

Beckett v Howe 58
Beckford v Tobin 396
Bedson's Trusts, Re 90
Beeston's Booth 378
Bell v Timiswood 211 Bell v. Timissiood 241
Bellew 271
Bellew 271
Bellew 272
Bibb v. Thomas 74 77
Birth v. Th Bleast In the goods of 60 78

New Roberts 187

Roberts 187

Blount V. Hiphans, 182

Blower I. Morrett 376

Both I. Morrett 376

Bradley V. Petroto 163

Brookshank In re 199

Brownston V. Winter 183

Froughton V. Brown 140

Brown V. Morrett 381

V. Brown 167

Brown V. Milen 378

V. Drown 169

Frown V. Milen 378

Brown V. Hope 115

Brown V. Hug 117

Brown V. Bruen 192

Bryan V. Twagg 117 Bryan v White 62
Brydges v Wolton 168
Buck v Norton 181
Budans v Richardson 49
Bull v Prichard 141
Burls v Burls 262
Burrows v Burrows 38
Bywater v Clarke 96
Byrd In the goods of 60
Cambridge v Rous 112
Camps v Blundell 84
Campbell In the goods of 261
— v Browning 164

Bryan v White 62
Brydges v Wolton 168
Buck v Norton 81
Bucks v Norton 81
Bucks v Norton 81
Bucks v Norton 81
Burls v Burls 262
Burrows v Burrows 38
- v Griffith 328
Bywater v Clarke 96
Byd In the goods of 60
Cambridge v Rouss 112
Cambys v Blundell 34
Cambys v Blundell 34
Cambbeil In the goods of 261
- v Browning 163
Cart v Browning 163
Casted v For 99
Catherwood v Chabaud 368
Chambers v Brailsford 86
Chamney In the goods of 56
Casson v Dade 61
Cassed v Browning 163
Chambers v Brailsford 86
Chamney In the goods of 60
Champion Re 2
Chapman v Hart 176
Chese v Lovejoy 75 77
Chestan Re 207
Chest v Chetty of 55
- v Taylor 57
Clark v Scripps 69
- v Swell 396
Clark or Naterhouse 373
Clavering v Elhson 157
Clare v Cleare 38
Cleaver In the goods of 55
- v Taylor 57
Clare v Cleare 38
Cleaver In the goods of 55
- v Taylor 57
Clare v Cleare 38
Cleaver In the goods of 55
- v Taylor 57
Clare v Scripps 69
- v Swell 396
Clark or V Scripps 69
- v Swell 396
Clark or V Scripps 69
- v Swell 396
Clark or V Scripps 69
- v Swell 396
Clark or V Scripps 69
- v Swell 396
Clark or V Scripps 69
- v Swell 396
Clark or V Scripps 69
- v Swell 396
Clark or V Scripps 69
- v Swell 396
Clark or V Scripps 69
- v Swell 396
Clark or V Scripps 69
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Clark or V Scripps 69
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- v Swell 396
Clark or V Scripps 69
- v Swell 396
Clark or V Scripps 69
- v Swell 396
Clark or V Scripps 69
- v Swell 396
Clark or V Scripps 69
- v Swell 396
Clark or V Scripps 69
- v Swell 396
Clark or V Scripps 69
- v Swell 396
Clark Countess De Vigney In the goods of 252 Coussmaker v. Chamberlayne 258

TABLE OF CASES

-d Hunt v Moore 151
-d Templeman v Martin 83
-d Thomas v Benyon 83
Donn Mans In the toods of 10
Dowledswell v Dowdeswell 274
Dovle v Blake 235
Drake v Drake 83
Drakel v Drake 83
Drakel v Drake 83
Drakel v Drake 83
Drakel v Drake 109
Drury v Smith 203
Dudfe v Champion 99
Duffi, ld v Duffield 148
-v Llewer, 208
Dugdale Re 162
Dummer v Pitther 195
Dunannon v Smith 129
Durance In bonu 73
Dutton Re 97
Duttone In bonu 73
Dutton Re 10
Durance In bonu 73
Dutton Re 97
Edde s Trusts, In re 135
Edmunds v Edmunds, 232
Fdyran v Archer 94
Edde s Trusts, In re 135
Edeles v Lambert 376
Fereton v Brownlow 150
Elike v Goodson 274
Elike v Goodson 274
Elike v Goodson 274
Elike v Goodson 274
Elike v Busenost 115
- v Eliot 385
Eans In the goods of 271
- v Powell 99
- v Saunders 312
- v Tripp 183
Evelyn v Ward 180
Ewing In the goods of 277
Feulkner v Daniel 274
Fearms v Archer 28
Earsen on the poods of 32
Evelyn v Ward 180
Ewing In the goods of 277
Ferenory Repeated 185
Emerson In the goods of 277
Ferenory Repeated 185
Emerson In the goods of 277
Fell w Early w Ward 180
Ewing In the goods of 277
Fell w Early w Ward 180
Ewing In the goods of 277
Fell w Early v Ward 180
Ewing In the goods of 277
Fell w Early v Ward 180
Ewing In the goods of 277
Fell w Early v Ward 180
Ewing V Freston 170
Fillingham v Bromley 158
Finch v Finch 76 192
Fincham v Edwards 46
Finedrac v Clarke 403
Festing v Allen 135 398
Fielding v Darrance 13
Finch v Finch 76 192
Fincham v Edwards 46
Finedrac v Clarke 403
Festing v Burrows 111
Felemings v Jarrat 352
Felickner Re 191
Folks v Documingue 33
Fornercau v Fenercau 140
Forbes v Forbes 12 13
Ford v De Pontes 73

Freman Re 109
Fortur t Easte 215 216
Forwit v Temana 267
Freman 74
Fremen v French 26
Fore Re 179
Frere Re 1

Harrison Re 82 164

- v All persons 211

- v Elvin 60 -v Eivin 60
-v Foreman 156
-v Rowley 167 168
Harter v Harter 279
Hartley v Tribber 90
Harwood v Baker 37
Hatchard v Mege 357
Hawers v Havers 267
Hawkes v Baldwin 160
-v Saunders 384 Hawkes v Baldwn 160

—v Saunders 384
Hayes In the estate of 308
Haynes v Mathews 277
Hayward v Kines 372 407
Hearn v Wigginton 111 112
Hearn v Wigginton 111 112
Hearn v Hearn -v Saunders 384 Hopwood v Hopwood 193
Horne Re 400
Horrell v Witts 271
Horsford In the goods of 78
Houghton v Frankin 380
Hubbard In the goods of 64
Huckvale In the goods of 56 58
Hugenn v Baseley 49
Hughes v Huppers 123 141
Humberston v Humberston 167
Humpfirey v Humphreys 228
—v Ingledon 228
Hunter Re 141 —v Ingledon 228
Hunter Re 141
Hutchunson v Lambert 258
Ibbetson In the goods of 78
Hott v Genge 58 60
Ingle v Richards 251
Inglus v Gilins 99
Ingram v Soutten 145
Innes v Mitchell 187 189
Irvn v Iromonger 391
Jackson In re 109 119
—v Jackson 135
—v Melley 112
—v Whitehead 255
Jacques v Chambers 98 182

Jee v Audley 127 Jenkins v Gaisford 53 -v Jones 179
-v Plombe 406
-v Powell 193 Jervis v Wolferstan 376 402 Jesson v Jesson 192 -- v Wright 81 86 96 Johnson v Johnson 121

v Telford 196

Johnston Re 162 176

v Beattre 17 -v Beattie 17
Jones In the goods of 218
-v Beytagh 241
-v Green 179
-v Jones 150
-v Mitchell 112
-v Strafford 268
-v Thomson 232
-v Westcomb 152
Juli v Jacobs 152
Keen v Keen 76
Kenrick v Burgess 246
Kerr v Middlesex Hospital 187 188
Kessinger v Kessinger 49 Kessinger v Hessinger 49
Kidney v Coussmaker 198
Killican v Parker 309
kindleside v Harrison 43 48 Kilican v Parker 309

Kindleside v Harrison 43 48

king v Denison 137

kingsbury v Walter 109 119

kipping v Ash 328

kirby v Potter 328

kirby v Potter 48

Kirb, Lindsay v Lindsay 291 Livesay v Redfern 172 Long v Blackall 125 – v Moore 134 Longford v Purdon 37

Powell v Evans 106 107
Preston v Melville 10
Price v Page 83
- v Powell 74 75 77
Priestly v Holgate 119
Prince v Dyce Sombre 43
Proctor v Bishop of Buth 131
Prottor v Bishop of Buth 131
Prince v Snaphin 190
Pye Ex parte 1'90
Pym v Lockyer 193
Pym v Lockyer

Tebbs s Carpenter 400
Declasson s Woofford 81 e2 e5
Decree Hennette Auree Deshais,
Leods of 2.2
Tharpe s Stallwood 215
Thirlwall Re 258.
Thornas s Butler 258.
The Tebres of the 117 156

The Wilberforce 141
Thomson In the Leods of 58.

Villberforce 141
Thomson in the Leods of 77
Thornton In the Leods of 78
Toomy In the Leods of 78
Treelyan Trevelyan 263
The s Treelyan Trevelyan 263
The s Treelyan Trevelyan 263
The toomy In the Leods of 78
Treelyan Trevelyan 263
The toomy In the Leods of 78
Treelyan Trevelyan 263
The toomy In the Leods of 78
Treelyan Southern 40
Turpine s Foreigner 90
Tyrele s Thornton 163
Turpine s Foreigner 90
Tyrele s Thornton 163
Turpine s Terreyland 163
Underwood t Wine 153
Urouhart s Butterfield 13A
Utterton x Robins 64
Youcham y Bell 81
Youdy y Ceddes 140
Yeag In the Leods of 225
Yenn Re 90
Yenn Semont 376
Vernen x Eemont 376
Wagstac Re 85

y Wagstaff 99
Wandord y Washood 228
216
Ward v Turner 208

Sutton v. Jruks, 150
Swetters, V. Prideran, 84 v. 86.
Swetters, V. Prideran, 84 v. 86.
Swetters, V. Prideran, 181
Syrr v. Glad tore, 143
Syrr v. Grader, 151
Syrr v. Glad tore, 143
Syrr v. Grader, 151
Syrr v. Grader, 151
Syrr v. Glad tore, 143
Syrr v. Starley, 160
Syrr v. Grader, 151
Syrr v. Glad tore, 143
Syrr v. Starley, 160
Syr v. Williams In the foods of 78

Adam of 66 of 78

Willand s Fenn 36

Willams s Clark 141

- s Goode 49 374

- s Haythorne 141

- s Jones 69

- s Lee 381

- Nuson, 406

Wills s Rich 228

Williams in Trusts Re 122 125

Williams in the foods of 60 335

- v Maddson 187 396

- v Lord Townshead 195

Williamson williamson 150

Williamson williamson 150 Wing v Angrave 152 Wingrove v Wingrove 49 Winsor v Pratt 72 Wright In the goods of 264

—v Sanderson 58

Wynne v Wynne 147

Wytcherley v Andrews 291

Yates v Compton 188

Young Re 198

—In the goods of 334

—v Holloway 291

# INDIAN CASES

A		Nor	re N
A Nor Abbu v Kuppammal Abdul Halim v Raja Saadat	E No	Anand Rao v Administrator Gene ral Ananga v Bala Ananga v Bala Ananga v Bala Ananga v Menakshi Anangapua i Meenakshi Ananga v Salai — v Laki Anvara v Makies Anwar v Secy of State Appacooty v Muthu Kumarappa Arakal v Domingo — v Narayana Arakal v Domingo — v Narayana Arayanda v Kalia Ariya v Thangammai Aroonachellan in re Arumungan v Valura Arumachala v Mathu Arunachalar v Mathu Arunachalar v Mohendra Asanand v Roshun Ba Asanand v Roshun Ba Asanand v Roshun Ba Asana Bengal Ry Co t Atul Chandra Aswint Kumar v Sukhaharan Attorney General of New Zealand V New Zealand Insurance Co Aung Ma v Mi Ah Avabau v Pestonji Ayeshaba v Ibrahim Aseem v Ameera Ammat v Sviidar Ali 221 327  Babasab v Narsappa Bahu Misra v Umer Bahunban Bahuna v Bunodin Bai Dekotore v Lakhand Bai Dekotore v Lakhand Bai Dusalixim v Hariprosad Baid Nath v Shamanund Bai Disalixim v Hariprosad Bai Harkor v Maneklal Bai Kashi v Parblu Bai Mannubau v Dosa Morarji Bai Nandkori v Magan Balumtha v Rashimath Balumutha v Rashimath	40
Abbu v Kunnammal	D A TO	Annes - Pala	18
Abdul Halim v. Para Sandat	00	Annanga v Darai	31
Abdul Kadar v Safahu	90	Anagappa v Meenaksni	41
Abdul Vorem v Machus um mune	200	Amapuria v Ivaniii	- Z3
Abdul Dahiman er Viette Abread	214	- v Kanyane 21.	1 42
Abdul Sattar at Saturahancan 92	2 200	Annodo y Atul	30
Abdul Sabur v Abuballar	07	Allinous V Atui 28:	7 30
Abdulla v Murthur 20	3 213	- v Itali	1 30
Abhiram y Gonal 292 328 33	345	Antoney v Makies	24
Ahinash v Probodh	292	Annkul v Gurunada	80
— In re 278	332A	Anwar v Secv of State 76	5 26
Achutan v Chriotti	408	Appacooty v Muthu Kumarappa	24
Achyutananda v Jagannath	227	Arakal v Domingo	110
Adans v Mrs Grey	81	- v Narayana 228 291	328
Adarji In te	273	Aravamudai v Kalia	23
Aditram v Bapulal	76	Ariya v Thangammal	425
Administrator General v Ananda		Aroonachellan In re	- 2
chari	26 29	Arumugam v Valura	233
- v Belchambers	112	Arunachala v Mathu	236
— v Lazar Stephen	120	Arunachallam v Ramaswami	38
-v White	90	Arunmoyi v Mohendra 308	340
v Money 109 10	117	Asanana v rosnini bai	bö
- V Hugnes 134 154	388	Asgar Reza V Abdul Hossein	105
- v Frem Lai	221	Asilutosii v Durga Charan 114	100
- v Christiana	3051	Asiatic Banking Corneration v	22011
_v Simpson	134	Viegas	406
Advocate General v Jimbabai	97	Assam Bengal Ry Co & Atul	
Adwait v hrishna 259A 321	323	Chandra	421
Aghore v Kamını	82	Aswini Kumar v Sukhaharan	304
Ahronee v Ahmed 360	361	Attorney General of New Zealand	
Akhileswari v Hari Charan 294 296	327	v New Zealand Insurance Co	97
***	328	Aung Ma v Mi An	242
Akkayya v Lakshmamma	350	Avadal V restonji	00
Aksnoy Kumar v Indira	140	Ayesnadai v toranini	417
Alacappa y Mancathas	89	Azimunnissa y Sirdar Ali 221 327	361
Alamere or Vankata	366	Azmat v Srtla	233
Alangamoniori y Sonamoni 123	124		
Alayandar v Danakoti 6	7 68		
Allahdad v Sant Ram 236	333	u u	
Alicethrop v Sheikh Shamatullah	231	D. b b 37 016	026
Alwar Chetti v Chidambara	221	Babasab v Narsappa 210	244
A L A R Firm v Maung Thwe 302	104	Bachman w Bachman	198
Amarendra v Suradnam 104	104	Rahura v Bunodur	246
Ambiga t hala	3.12	Bar Bhikan v Bar Dinbar	169
- v Santara	158	Bai Devkore v Lalchand	425
Ameer Chand v Mohamund 58 248 32	332	Bai Dhanlaxmi v Hamprosad	154
Amerchand Ex parte	349	Baid Nath v Shamanund	688
Amirthayyan v Ketha	1 96	Baı Dıwalı v Patel	117
Amirtha Lal v Surnomoyi	125	Bai Ganga v Bhagwan	64
Ammanna v Gurumurthi	233	Bai Harkor V Maneklal	223
Ammabe v Ponnammal	197	Bai Kasni V Paronu	112
Amması Kuttı V Appalu	1231	Dai Mandlori v Maran	425
Ammayee v reiumabu	327	Raikintha v Kashinath	99
Amula Charan w Kalidas	220	Baisnay v Kishori	78
Amurya Charan v Kantas	107	Ral Rhadder v. Prag Dutt	52

	Bluban v Kuran Bala
Note No	Note No
Balasubramaniam v Rodrigues 357	Bhuban v Kıran Bala 271
- v Marian 357	Bibhuti v Pankuer 328
Baldeo v Gulap 50	Bijay v Parmatmanand 236
Balmukund v Bhagwandas 58	Binode v Radha Lal 425
- v Kundon 412	Dilaso V Munni Lai
Balkrishna v vinayek 3000	Bur v Barkhurdar 425
Dallagen v Verbern 737	Bushen Chand yr Asmarda 122
Bal Congadhar v Sakwarhar 294 299 340	Biso Ram v Emp 215
Ballay v Peoples Bank 236	Bissonath v Davaram 60
Banchharam v Advanath 232 236	Bissessur v Durgadas 232
Bance Madhab v Nilambar 425	Bissen Chand v Chatrapat 237
Bank of Bombay v Ambalal 223	Bodi v Venkataswami 68 99 223
Bank of Chettinad v Ma Ba Lo (p 3)	Bohra v Gendo 339
Banwari v Maksudan 237	Bonnaud V Emie Charriol 10 11
Barada v Phutumani 323	Bonny v Edwards 270 368A
Pagendra 303	Brotocwart v Parile 22
— v Gonei 227	Brunath v Chandar 340
Basti Begam v Saulat 426	Brulal v Secv of State 303
Batası v Mahesh 231	Brit v Ramrick 310 345
Bayabai v Haridas 89	Brindaban v Sureshwar 271 291 328
Beer Pertap v Rajendra 52	Brinda v Radhica 291
Beegrag v Bhyropersaud 2	Biso Ram v Emp 215
Behari v Majid 239	Brito v Rego 6A
Behary Lall v Juggo Mohan 222	Brojendra V Niladrinath 412
Benode Benari v Kai Sundari (p 2) 209 217	Droju v Iswar 239
Reput a Manada 291	W Saraus Bala 255 312
- v Brojonath 105	- v Dasmoni 346
Bhabatarini v Prafulla 215 219	Broughton In the goods of 78
Bhagirathibai v Vishwanath 39	Bua Ditta v Devi Ditta 320 322
Bhagabati v Kalı 80A 122 138	Bulaki v Shambhu 293
Bhaovan v Hiraji 230	Bur Singh v Uttam Singh 43 19 70
Bhagyansang v Becharadas 223	— v Santo Dijat
Bhagwan v Ram Das 332	
Bharmal v Mairc 267	C
Bhagwani v Manni Lal 425	
Bhagwati v Bahuria 267 269 277	Cally Nath Chunder Nath 123 124
Bhak Mal V Maisk 218/	Carrierott 112
Bhaurao V Lakshmi Bat 252 253 315 316	Chang No s Shar Ok 231
Bhararam w Nathu 102	Chutanya y Dayal 6A
Bhim v Punish (p 3)	Champai v Puran Mal (p 2)
Bhim Sin v Muhammad Ali 257	Champalal v I aherbai 417
Bhimnath v Tara 121	Chandra v Prasanna 226 300
Bhimappa v Khanappa 217	Chandra V Robini 333
Bholanath Pal In te	Chandidae a Mahan 81
118 158	Chan Pun v Chan Chor 410
Bhobosondun In re 291 306A 318 329	Chand Mall & Lachhmu 6A
Bhuban Mohini v Kiran Bala 27:	Chandler (Mrs) v Administrator
Bhugwandeen v Myna Baee 21	General 151
Bhupati v Chandi 80/	Chara Chardes & Nathu Chardes 229
Drupendra V Purna 190	26 751
_ 1 Ashtabhua 316 345 31	Charu Bala v Menaka 296 322 327
Bhuranea y Ramayamma 100	Charu Sila v Jyotish 232
Bhubaneswari \ Collector of Gaya 36	Chidambara v Krishnasami 240
Bhudat v Mangat 23	Chinnappa v Kailasam 71
Bhuggobutty In the goods of 29	Chings Marcos es Am a Nachel 221
Rhutnath a Sect of State 21	Chinnam v Tadikonda 380
examined a prey or prace #1	004

P	VOTE	No	Note No
— O mond Chutterput v Moharaj Bahadur	91	345 146 102 91 106 412 229 361	Dulahu Jadanath v Bisheshar   6A 52
Cohen v Cohen Collector of Ahmedabad v Saw		150 223	E
chand Collector v. Jagut Courjon In the goods of Cowasji v. Rustomii Cov er Suttya Krishna In the goods of Cur andas v. V.indravandas C. V. Nayagan In the Estate of		241 276 126 243 97	E S Aboor v E E Molla 362 Lastern Mortgage and Agency Co v Rebat 363 Efart v Podat Elvins (Mrs.) v Dr Cullen 97 Ella Lavelette v Tabum 261
D			
Dagree v Pacotti Daho Kuer v Tural Damini v Fatumani Damodardas v Dayabhai	96 186	117 353	Erasha v Jerbai 27 115 E oof Ebrahim v Esoof Sulaiman 266
		251 135	F
	241 338 223	55 323 339 242 318	Fordunji v Navajbai         274           Fatehchand v Rupchand         102           — v Muhammad         233           Fatimabai v Pribhai         231           Fernandez v Alves         60
Digambar v Narayan	254	425	Gabriel v Mordaka 66 Gadodia v Raghubar 255 Gadodia v Raghubar 255 Gadodia v Raghubar 255 Ganga Sahai v Gokul Prasad 211 Ganga Sahai v Babu Lai 211 Gangaswar Abor v Collector of Patria 38 Gangeswar Abor v Gollector of Patria 38 Gangeswar Abor v Gandaria 226 Ganshamdoss v Gulab 228 Ganshamdoss v Gulab 228 Ganta Daniyeli v Gunti Yesu 328 Gando Samdary v Nalim 405 Gany v Omer 2022 Garab Sahay v Patradassi 80A 326B 326C Gaupu v Atrishnappa 602 Gaupu v Atrishnappa 602 Gaupu v Atrishnappa 622 Gaupu v Atrishnappa 622 Gaupu v Marka

| Note Not| George Nash | In the goods of George Nash | In the goods of Ghellabau v Nandubar | 231 | 321 | 321 | 322 | 341 | 341 | 342 | 342 | 342 | 342 | 342 | 343 | 343 | 343 | 343 | 344 | 344 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 345 | 3 Haradhone v Dasarathi Hargovind v Collector of Etawah Hardar Ali v Tasadduk Rasul Khan 104 1agat Bijoy v Tomijuddin 140 6A Jagat Singh Sangat Singh (3)

Jagdeo v Deputy Commissioner Jopon v Manbohan Jathai v Rewaram Jogobandhu v Dwanka Jagmohan v Sheoral Jan Der v Banwan Jarohan v Sheoral Jarohan v Joreshwan – v Maurakhan – v Maurakhan – v Kesowyee – v Ganga Jameshwan v Ugreshwan Jammaba v Dharsey Jammaba v Dharsey Jammaba v Dharsey Jammaba v Dharsey Jammaba v Hafu Jamwa han – v Kahum – v Dharsey Janakuran v Negamony Janakobat v Gajanand Jayo Chandra v Satish Chandra Jawad Ah v Kamlapat Jehangir v Kahkusu – v Kukhoai – v Rambahan Jiu Lal v Binda Bib Jianendra vah Rambahan Jiu Lal v Binda Bib Jianendra vah Rambahan Jiu Lal v Binda Bib Jianendra vah Rambahan Joe v Rambahan Jiu Lal v Binda Bib Jianendra vah Rambahan Joes v Binku – v Jitendra Jones v Administrator General Juesehvar v Ramchandra Jones v Administrator General Juesehvar v Ramchandra Joti Mai v Coates Jueselvar v Ramchandra Joti Mai v Coates
k.

Venkataramayya v Pitchamma Kahn Devi V Salamat Kaikushru V Shiribai hali Coomar v Tara Prosunno hali Kumar v Nufabati Kalidas v Kanhaya Lal - 1 Mahah Halian Singh v Ram Charan
— Sanwal Singh
Haloo V B bi Ramo

1 Ram
1 Ram
1 Ram
1 Ramal Provad v Murl 146
1 Ramal Rumari v Narendra
Ramal Lochan v Multuttan
Ramal Lochan v Multuttan
Ramal Lochan v Multuttan
Ramal Dona v Multuttan Kamal Din v Hajram

Kamakhya v Kusal

Nammathi v Mangappa

NOTE No. 102 hamawati v Dighbijai 209 214 hanchan v Baij Nath 365 hanakamma v Venkataratnam 361 hanakamma v Venkataratnam 361 kandayami v Murugappa 162 Kandiya Lai v Murni 416 417 Kanhava Lai v Murni Chand 118 135 Kanhava Lai v Hira Bibi 257 Khanti Charan v Kristo Charan

257 Kantt Charan v Kristo Charat
94 Karanis v Karsandas
213 Karanis right v Rupwant
48 50 Karanis right v Rupwant
48 50 Karanis right v Rupwant
49 0 Karanis right v Rupwant
13 Karan Singh v Rupwant
13 Karan Singh v Rupwant
13 Karanis right v Rupwant
13 Karanis right v Rupwant
14 Karanis right v Rupwant
15 Kasa Chandra v Gopi
16 Karanis right v Rupwant
17 Karanis right v Rupwant
18 Karanis right v Rupwant
18 Karanis right v Rupwant
19 Karanis right v 117 — V Gaya Nath 312 Kedar v Sarojim 425 keshi Parshad v Madho Prosad 401A Kesho Ram v Ram Kuar 40 331 keshori v Nihal Devi 102 Ketki v Kamal 249 kewati v Chudra Lai

homolakant In re hollany v Luchmee holaremathu v Madhavi

knishnaraman v Madhavi knishnaraman v Marendra 417 knistoramoney v Mohim 417 knistoramoney v Mohim 418 knisto Gopal v Madharaja Naren 410 knisto Gopal v Baidya Nath 21 knishna Alyar v Swami Nath 85 knishna Behari v Corporation o 486 Calculus 408 Calcutta

Krishna kinker v Panchuram

251 — v Atmaranı 417 Asıshnaramanı v Ananda 804 Asıshnaswamı v Vairabnath 231 - v Kuttu Krishna

	Note	No	1	Note	No
Krishnamoyi v Mohim Chandr Kshitish Chandra v Radhanath	<b>a</b> .	248 350	Ma E Me v Ma E Ma Mm Dwe v Shunmugam Ma Myo v Ma Pwo Ma Nan Thu v Ma Shwe Mi Ma Nyu v Ma Pwo Ma Nan Thu v Ma Shwe Mi Ma Nyu v Ma Phu Ma San Wa Chut Ma San v Ma Chut  —v Ma Chut Ma Shan v Ma Chut —v Ma Chut Ma Then v Nepean Ma Thu v Shwe Ha Chut Ma Thu v Shwe Ha Chut Ma Thu v Chutiappan Madan Mohan v Ramdal Madan Gopal v Narbada Madan Wa V Chutiappan Madan Mohan v Ramdal Madan Gopal v Narbada Madan Wa V Chutiappan Madan Mohan v Ramdal Madan Gopal v Narbada Madhata v Husan Mahata v Hargoram Das Mahamed Shumsool v Sewakram Mahamad Shumsool v Sewakram Mahamad Wa Shum Mahamad Wa Wa Wa Wa Mahamaya v Gangamoy Mahan Jogendra v Ram Chander Mahamad Wa Gangamoy Mahan Jogendra v Ram Chander Mahamad Wa Gangamoy Mahama Jogendra V Ram Chander Mahamad Ma Backer v Bee Bee Manorama v Shiva Sundari Mana Abu Backer v Bee Bee Manorama v Shiva Sundari Mana Abu Backer v Bee Bee Manorama v Shiva Sundari Manaham Jetha In re Manu Husan Manahama Manlayanal Manahama Wallahamaya Namahamaya v Hormasij Manchers I w Hormasij Manchery w Muhhbai Mangaldas v Tribhuwandas — v Ramchoddus Manahama Manlayanal Manahama Manlayanal Manahama Manlayanal Manahama Walanlayan Manahama w Jallushan Manahama Walanlayanal Manahama Manlayanal Manahama Walanlayanal Manahama Walanlayanal Manahamayanal		328 374
Kubchand v Motibai	2	57A	Ma Nan Thu v Ma Shwe Mi		225
huchu Iyer v Vengu Ammal		421 208	Ma Nyi v Aung Myat	363	261 364
kumud Knshna v Jogendra		145	Ma San s Ma Chit 224	225	267
Kunja Lal v Kailas	291	293	Ma Saw v Ma Thit		26
Kunjamoni v Nikunja		113	Ma Sein v Chetty Firm		359
Kunjunni v Kongathil	000	425	Ma Shan v Ma Chin		342
Kuppuswami In re	57 321	409 326	Ma Chit 224	225	302
kurrutul ain v Nuzbatuddowla		318	Ma Thin v Ma Ahma		3
Kusum Kumarı v Satishendra	9	38	Ma Thi & Shwe Hla		241
Nyone Hoe v Nyor Soon	2	AVO	Ma Yan v Chathappan		418
_			Macleod v Sorabji	388	405
L			Madan Mohan v Kamdiai Madan Gonal v Narhada		216
Lachhobibi v Gopi Narain		50	Madhay Rao y Manik Lal		270
Lachman Das v Chater		33	Maiat Lal v Kanas Lal	99	109
Lachmi v Ganga		231	Mahatah v Hub Lal	201	356
Ladorani v Sibhag	248	267	Mahomed Hussein v Bai Aishaba		359
Lakhi Narain v Multanchand	259A	362	Mahamed Shumsool v Sawakram		6A
Lakshmidas v Rooplal		49	Mahomed v Sabida		253
Lakhi v Mulchand		291 6A	Mahammad Hasain V Ali Haider		222
Lakshmma v Ratnamma	114	226	Maharajadhiraj Kameshwar Singh		
Lakshmi v Nityananda		241	y Pherozsha Merwanjinanabhoy		222
Lal Singh v Kishen Devi	315	317	Mahant Jogendra v Ram Chander		236
Lala Ramjewal v Dal Koer	102	146	Mahima Chandra v Sarajubala	241	243
Lala Goberdhone v Hansh	24	375	Mahabir v Lala Baldeo		421
Lalchand v Nandlal	201	236	Mahendra In the goods of		289
Lairt Mohon v Nirodmoyi — v Nahawdin	204	291	Mana Abu Backer v Bee Bee		236
- v Chukkun Lal 80A	81 102	162	Manorama v Shiva Sundari		293
Lalit Chandra v Baskuntha	321	332	Manuhha Chundal v General		296
Lalı v Murlıdhar	0-1	85	Accident Fire and Life Assurance		
Lallu v Jogmohan		113	Management & Ahmed 231	12A 253	334
Lalta Prasad v Siligram		85	Manick Lal In the goods of	200	255
Leckie In the goods of	fob.	265	Manchersa In 16		255
Hone You	. 3	60A	Mancherji v Mithibai		35
Leon Home & Leon Ah	36A	50	Madhu Krishna In te		424
Lila Singh v Bejoy Protap	37 38	50	Manickbai v Hormasji		58 58
Lona Chand v Uttam Chand		415	Manekji i Manabhai 86	90	97
Lucas v Lucas	332	346	~ v Ranchoddas	124	129 195
Luchmun V Dukharan		305	Manjamma v Padmanabhayya	109	129
			Manikyamala v Nand Kumar	106	117 146
M			Manaji v Sree Rama		52
Ma Chein v Maung Tha		340	Mandakini v Arunbala		35 186
Ma Chit v National Bank		362	Mangal Khan v Salimulla		239
- \ Ayaw Maung		2/0	Manikam v Venkatesa		82

Mancharam v Bai Mahali Manchersa In re Manindra Chandra v Sudh Krishna Mannu v Lechman Man Singh v Santi Mankamma v Balishan Manamhi v Fatmabai Marwadi v Samraji Mary Wilson v George Oakes Mary Akhbar v Sangster Maseyk v Ferguson Mathuradas v Raumal – v Goculdas	Note	No	1	No	re No
Mancharam v Bas Mahali		236	Monorath a Ambica		23
Manchersa In 78		255	Monoranian w Buow human		34
Manindra Chandra v Sudh	12		Moraru a Nenhai		ĭi
Krishna		364	Moore In the sands of		29
Mannu v Lechman		186	Mothby a Tamehotine		~~~~
Man Singh v Santi		242	Motifal v. Chellabbar		23
Mankamma v Balkishan		117	Motibal v harcandas		25
Mariambi v Fatmahai		97	Motifal v Harnarasan		35
Marwadi i Samran		355	Muddun Mohon v Bali	20	1 32
Mary Wilson v George Oakes		81	Muhammad Ali s. Puttanhihi		23
Mary Akhhar v Sanester		7.71	Muhammad Ahdul Chant at Faki	hr	~~
Maseuk v Fermison	123	154	Tahan	***	68
Mathuradas v Raimal  v Goculdas Mathuranath v Monmohini Mathura v Bhikan Matadin v Gayadin Mathura v Durgawati  v Rukmini	200	374	Muktonath a Istondea 54	55	58 6
_ s Goculdas		222	Mula y Bas Ham	20 1	15
Mathuranath y Monmohini	135	138	Mun Mohan v Daroch Noth		111
Mathura s Bhikan	64	104	Municipal & Manchammal		225
Matadan & Cauadan	UA.	570	Munisanii V Maculiaminai		16
Mathurn at Durgon at		227	Muntoe v Dougras		0:
- 17 Dulemin		237	Muran Lan V Kundan Lan		20
Maung The w Maung Hlaw	410	416	Music Dec at Achiet Dec		425
Maung Tun v Ma Son	410	340	Museument Coleb Days 74 4		420
Maya Pam y Shih Dac	221	237	roussammat Goldo Daye In in	16	300B
Mr Thrahim & Shaikdas.cod	ພະ	358	Mulna In the goods of		265
Md Valub v Md Shahid		90	triffile in the goods of		2.00
Machran tr Krishna		222			
Mahar Chand w Lachhan		257			
Maerra & Broughton		271			
Midnapore Zemindary Co. Itd. s	,	211	N		
Pam Kanas	221	364	41		
Mathuradas Vasamal  — V Goulds  — V Goulds  Mathuranath v Monmohini  Mathura Bhikan  Mathura Bhikan  Mathura Durgawati  — v Rukmini  — v Rukmini  Maung Tha v Maung Hlaw  Maung Tha v Ma Sen  Maya Ram v Shib Das  Mr Ibrahim v Shaikdavod  Md Yakub v Md Shahid  Meghray  Marshim  Meghray  Marshim  Meghray  Marshim  Midnapore Zamindary Co Lid v  Ram Kansi  Miller v Administrator General  Milashain v Shaikdavod  Minashain v Vishwanath  Minashain v Vishwanath	10 22	23	N N Chatters Tan Ma Pu		362
Minakshi v Vishuanath		7	Nahaonnal v Sarala	4	A 49
Mir Throhim v Zia nimeea	240	409	Naha Chandra v Teipura	7.	371
Miran Rakha & Meherbibi	210	67	Nahin s. Niharan		291
Miranda In re	3	39	Nafar Chandra v Ratan Mala		124
Mir Saved x Taixaba	-	68	Nagalini am a Ramchandra		118
Misri Lat v Ashrafi		420	Nagendra v Satadal		238
Mi Saw v Nga Nyan		333	Napindra v P N Baneriee		78
Mithi Bai v Canii	248	249	Nakshatramalı v Brasa Sundar		124
- v Meherbai		361	Nahni Kanto Pal Re		411
Midragore Zamindary Co Ltd v Midragore Zamindary Midragore Midragore Midragore Midragore Midragore Midragore Midragore Midragore Mohammad Abu V Nisar Ali Mohammad Sharifan Mohammad Abull Hossain v Mohammad Sharifan Mohammad V Sabida — In 16	65	67	Nalim v Bejoy		293
Mohammad Shumsool & Shewuk		- [	Namberumal v Veeraperumal	191	360
ram		6A	Nanchand v Yenawa		233
Mohammad Hasan v Alı Hider		57	Nand Lishore v Pasupati	267	308
Mohammad Yu uf v Abdar Rahin	233	239	Nannu Meah v Krishnaswami		104
Mohammad Abdul Hossain v	7		Narayana v Penathambi		90
Sharifan	234	421	Narendia v Kamaibasini Dasi	144	TAG
Mohammad v Sabida	253	370	Name of Taba	144	252
- In te		248	Narayan V Tana		242
Manommad ibranim v Bhagwa	1	222	Naramanian y Ramanam	1	25.4
Das		200	Managam v Audimistrator Ochera	351	352
Mahandan I I Inter goods of		201	Machharam a Tarrallahh	280	317
Mahash Chandra & Correst Correst	+	501	Namandae w Narandae	405	222
- it Programeth	IL.	370	Narandra v Charu Chandra		277
Mohamidu + Potchas		255	Namman v Devidas		52
Molshada w Surendra		ROA	Narain a Govindo		52
Mokehadaway w harnadhar	201	291	Nathuram v Alliance Bank		257
and a state of the	297	328	Narayan v Taha Naranamah v Ramanath Narayan v Admunistrator General Narayanasum v Esa Narahasum v Gandra Narahasum v Goundo Narah v Goundo Narah v Goundo Narah v Goundo Narah v Allance Bank Navalchand v Manek Chand Navoju v Peroobah Nemdhan v Bissessan Neemdhan v Stiskanta		154
Molla Cassin v Molla Abdul		370	Navron v Perozbai	117	118
Monmotho v Puran Chandra		361	Nayroji v Perorbai Nemdhari v Bissessati Nepenbala v Sitikanta Nepusi v Nasiruddin Neshitt In the goods of Nea Ba v Nea Po	_	232
Monmohini v Banga Chandra	312 3	26A	Nepenbala v Sitikanta	26	29
- v Taramoni	332	346	Nepusi v Nasiruddin		236
Monorama v Kalı	97	112	Neshitt In the goods of		265
Manahur v Lacienese		145	Non Bay Nea Po		444

Note	1	Note No
Nulmoney w Limenath 501	Phonundra s. Namendra	327 339
_ In 70 291	Phan Tivak v Lim Kvin	26 225
Niladrinath v Saroinath 187	Phul Chand v Kishmish	213
Nirmal v Saratmani 43 53 55	Phekni v Manki	247 258
Nirode Baran v Chamatkarini 310	Piramu Ammal v Serunatha	90
Nishikant v Ashutosh 242	Pirojshah v Pestonji	292 328
Nistarini v Behary Lal 144 145 146	Pitambar In re	289A
- v Brohmomoyi 296	Pitam Lal v Kalla	320
v Nando Lal 361	Pitchai Kuttia v Ranganadhan	237
Nitye Gopal v Nagendra 59 60	Po Kin v Ma Sein	347
Nobodoorga In 7e 32b	Ponnusami v Dorasami	26
Notandas y Aishindai 570	Porthern Ly the reads of	917
rounds of 250 a 222	Profulla er Brownden	203
80043 0)	Pramila Rola v Isotundra	271
D.	Praead Narain v Dulhin Genda	346
-	Promotha Nath v Gour	300A
Ochavaram v Dolatram 242 340	Pran Nath v Jadonath 247	249 344
Official Assignee v Vedavalli 153	Prayrag Rag v Goukaram	342 362
Official Trustee v Lumudini 295	Prasanna Kumarı v Baikunthanath	1 38
Okhoymoney v Nilmoney 112 122 152	Pratapchandra v Kalı Bhanjan	337
Okhoy Coomar \ Kailash 382	Prayag Kumari v Siva Prosad	37 227
Omayashi \ Ram Chandra 239	B	352 354
Oriental C S I se Accurance I td	Prom Sulh v Pachati	300 302
v Vantaddie 421	Priva Nath v Sailahala	260 294
1 1 11111111111111111111111111111111111	Probodh v Harish	105
	Prosonno v Administrator General	167
P	- v Knsto	227
The Associate Control Street	riosonno Kuman v Ram Chan	
Padget v Priest 352	dra Daniel Den Den de Chan	259 259A
Padget v Priest 352 Padma Priya v Dharmadas 38 326	dra Pubitra Dasi v Damoodar Pullah Chati v Varadarayili	259 259A 102 105
Padget v Priest 352 Padma Priya v Dharmadas 38 326 Padman v Hanwanter 76 Pakram v Innas	dra Pubitra Dasi v Damoodar Pulliah Cheti v Varadarajulu Pulin Behari Abdul Maud	259 259A 102 105 237
Nursing Chandra Bysack In the goods of	rrosonio Rumari y Rain Chan dra Pubitra Dasi y Damoodar Pulliah Cheti y Varadarajulu Pulin Behari y Abdul Majid Pulling y Great Eastern Railway	259 259A 102 105 237
Padget v Priest         352           Padma Pnya v Dharmadas         38 326           Padman v Hanwanter         76           Pakiam v Innasi         339           Palani v Vecrammal         233           Palaniappa v Raja Ramnad         337	risonno Kumati V Kani Chan dra Pubitra Dasi v Damoodar Pulliah Cheti v Varadarajulu Pulin Behari v Abdul Majid Puling v Great Eastern Railway Co	259 259A 102 105 237
Padget v Priest   382	dra dra Varadarajulu Pulina Cheti v Varadarajulu Pulina Cheti v Varadarajulu Pulin Behari v Abdul Majid Puling v Great Eastern Railway Co	259 259A 102 105 237 7 357 94 104
Padget v Priest         352           Padma Priya v Dharmadas         8 365           Padman v Hanwanter         359           Pakiam v Innasi         339           Palania v Veerammal         233           Palaniapa s Raja         367           Panchiu Gopal v Najadas         367           Panchiu Gopal v Najadas         367           Panchu Gopal v Najadas         367	dra dra dra v Damoodar Pullish Cheti v Varadarajulu Pulin Behari v Abdul Majid Pulling v Great Eastern Railway Co Punchoomones v Troylucko Punjab Singh v Ram Autar	259 259A 102 105 237 7 357 94 104 356
Padget v Priest         352           Padma Priya v Dharmadas         3           Padman v Hanwanter         3           Pakum v Innasa         39           Palam v Veerammal         39           Palam palamapa         233           Palam v Bapanna         233           Parchu Gopal v Kahdas         187           Pandurany v Yimayak         63           78         88	dra	259 259A 102 105 237 7 357 94 104 356 80A 96
Padma Priya v Dharmadas         38 365           Padman v Hanwanter         76           Pakisam v Ignasi         39           Palan v Veerammal         233           Palan pana         233           Palam v Perammal         233           Pallam v Bapanna         23           Panchu Gopal v Kahdas         187 395           Pandurang v Vinayak         67 8 88           Pa Warkadas         271	Pubitra Dasi v Damoodar Pulliah Cheti v Varadarajulu Pulin Behari v Abdul Majud Puling v Great Eastern Railway Co Punchoomones v Troylucko Punjab Singh v Ram Autar Purnachandra v Nabin Chandra	102 105 237 7 357 94 104 356 80A 96 361
Padma Priya v Dharmadas         38 365           Padman v Hanwanter         76           Pakisam v Ignasi         39           Palan v Veerammal         233           Palan pana         233           Palam v Perammal         233           Pallam v Bapanna         23           Panchu Gopal v Kahdas         187 395           Pandurang v Vinayak         67 8 88           Pa Warkadas         271	Pubitra Dasi v Damoodar Pulliah Cheti v Varadarajulu Pulin Behari v Abdul Majud Puling v Great Eastern Railway Co Punchoomones v Troylucko Punjab Singh v Ram Autar Purnachandra v Nabin Chandra	102 105 237 7 357 94 104 356 80A 96 361
Padma Priya v Dharmadas         38 365           Padman v Hanwanter         76           Pakisam v Ignasi         39           Palan v Veerammal         233           Palan pana         233           Palam v Perammal         233           Pallam v Bapanna         23           Panchu Gopal v Kahdas         187 395           Pandurang v Vinayak         67 8 88           Pa Warkadas         271	Pubitra Dasi v Damoodar Pulliah Cheti v Varadarajulu Pulin Behari v Abdul Majud Puling v Great Eastern Railway Co Punchoomones v Troylucko Punjab Singh v Ram Autar Purnachandra v Nabin Chandra	102 105 237 7 357 94 104 356 80A 96 361
Padma Priya v Dharmadas         38 365           Padman v Hanwanter         76           Pakisam v Ignasi         39           Palan v Veerammal         233           Palan pana         233           Palam v Perammal         233           Pallam v Bapanna         23           Panchu Gopal v Kahdas         187 395           Pandurang v Vinayak         67 8 88           Pa Warkadas         271	Publira Dasi v Damoodar Pulliah Cheti v Varadarajulu Pulin Behari v Abdul Majud Puling v Great Eastern Railway Co Punchoomones v Troylucko Punjab Singh v Ram Autar Purnachandra v Nabin Chandra	102 105 237 7 357 94 104 356 80A 96 361
Padma Priya v Dharmadas         38 365           Padman v Hanwanter         76           Pakisam v Ignasi         39           Palan v Veerammal         233           Palan pana         233           Palam v Perammal         233           Pallam v Bapanna         23           Panchu Gopal v Kahdas         187 395           Pandurang v Vinayak         67 8 88           Pa Warkadas         271	Publira Dasi v Damoodar Pulliah Cheti v Varadarajulu Pulin Behari v Abdul Majud Puling v Great Eastern Railway Co Punchoomones v Troylucko Punjab Singh v Ram Autar Purnachandra v Nabin Chandra	102 105 237 7 357 94 104 356 80A 96 361
Padma Priya v Dharmadas         38 365           Padman v Hanwanter         76           Pakisam v Ignasi         39           Palan v Veerammal         233           Palan pana         233           Palam v Perammal         233           Pallam v Bapanna         23           Panchu Gopal v Kahdas         187 395           Pandurang v Vinayak         67 8 88           Pa Warkadas         271	Publira Dasi v Damoodar Pulliah Cheti v Varadarajulu Pulin Behari v Abdul Majud Puling v Great Eastern Railway Co Punchoomones v Troylucko Punjab Singh v Ram Autar Purnachandra v Nabin Chandra	102 105 237 7 357 94 104 356 80A 96 361
Padma Priya v Dharmadas         38 365           Padman v Hanwanter         76           Pakisam v Ignasi         39           Palan v Veerammal         233           Palan pana         233           Palam v Perammal         233           Pallam v Bapanna         23           Panchu Gopal v Kahdas         187 395           Pandurang v Vinayak         67 8 88           Pa Warkadas         271	Publira Dasi v Damoodar Pulliah Cheti v Varadarajulu Pulin Behari v Abdul Majud Puling v Great Eastern Railway Co Punchoomones v Troylucko Punjab Singh v Ram Autar Purnachandra v Nabin Chandra	102 105 237 7 357 94 104 356 80A 96 361
Padma Priya v Dharmadas         38 365           Padman v Hanwanter         76           Pakisam v Ignasi         39           Palan v Veerammal         233           Palan pana         233           Palam v Perammal         233           Pallam v Bapanna         23           Panchu Gopal v Kahdas         187 395           Pandurang v Vinayak         67 8 88           Pa Warkadas         271	Publira Dasi v Damoodar Pulliah Cheti v Varadarajulu Pulin Behari v Abdul Majud Puling v Great Eastern Railway Co Punchoomones v Troylucko Punjab Singh v Ram Autar Purnachandra v Nabin Chandra	102 105 237 7 357 94 104 356 80A 96 361
Padma Priya v Dharmadas         38 365           Padman v Hanwanter         76           Pakisam v Ignasi         39           Palan v Veerammal         233           Palan pana         233           Palam v Perammal         233           Pallam v Bapanna         23           Panchu Gopal v Kahdas         187 395           Pandurang v Vinayak         67 8 88           Pa Warkadas         271	Publira Dasi v Damoodar Pulliah Cheti v Varadarajulu Pulin Behari v Abdul Majud Puling v Great Eastern Railway Co Punchoomones v Troylucko Punjab Singh v Ram Autar Purnachandra v Nabin Chandra	102 105 237 7 357 94 104 356 80A 96 361
Padma Priya v Dharmadas         38 365           Padman v Hanwanter         76           Pakisam v Ignasi         39           Palan v Veerammal         233           Palan pana         233           Palam v Perammal         233           Pallam v Bapanna         23           Panchu Gopal v Kahdas         187 395           Pandurang v Vinayak         67 8 88           Pa Warkadas         271	Publira Dasi v Damoodar Pulliah Cheti v Varadarajulu Pulin Behari v Abdul Majud Puling v Great Eastern Railway Co Punchoomones v Troylucko Punjab Singh v Ram Autar Purnachandra v Nabin Chandra	102 105 237 7 357 94 104 356 80A 96 361
Padma Priya v Dharmadas         38 365           Padman v Hanwanter         76           Pakisam v Ignasi         39           Palan v Veerammal         233           Palan pana         233           Palam v Perammal         233           Pallam v Bapanna         23           Panchu Gopal v Kahdas         187 395           Pandurang v Vinayak         67 8 88           Pa Warkadas         271	Publira Dasi v Damoodar Pulliah Cheti v Varadarajulu Pulin Behari v Abdul Majud Puling v Great Eastern Railway Co Punchoomones v Troylucko Punjab Singh v Ram Autar Purnachandra v Nabin Chandra	102 105 237 7 357 94 104 356 80A 96 361
Padma Priya v Dharmadas         38 365           Padman v Hanwanter         76           Pakisan v Ignasi         39           Palan v Veerammal         233           Palan pana         233           Palam v Perammal         233           Pallam v Bapanna         23           Panchu Gopal v Kahdas         187 395           Pandurang v Vinayak         67 8 88           Pa Warkadas         271	Publira Dasi v Damoodar Pulliah Cheti v Varadarajulu Pulin Behari v Abdul Majud Puling v Great Eastern Railway Co Punchoomones v Troylucko Punjab Singh v Ram Autar Purnachandra v Nabin Chandra	102 105 237 7 357 94 104 356 80A 96 361
Padma Priya v Dharmadas         38 365           Padman v Hanwanter         76           Pakisan v Ignasi         39           Palan v Veerammal         233           Palan pana         233           Palam v Perammal         233           Pallam v Bapanna         23           Panchu Gopal v Kahdas         187 395           Pandurang v Vinayak         67 8 88           Pa Warkadas         271	Publira Dasi v Damoodar Pulliah Cheti v Varadarajulu Pulin Behari v Abdul Majud Puling v Great Eastern Railway Co Punchoomones v Troylucko Punjab Singh v Ram Autar Purnachandra v Nabin Chandra	102 105 237 7 357 94 104 356 80A 96 361
Padma Priya v Dharmadas         38 365           Padman v Hanwanter         76           Pakisan v Ignasi         39           Palan v Veerammal         233           Palan pana         233           Palam v Perammal         233           Pallam v Bapanna         23           Panchu Gopal v Kahdas         187 395           Pandurang v Vinayak         67 8 88           Pa Warkadas         271	Pubitra Dasi v Damoodar Pulliah Cheti v Varadarajulu Pulin Behari v Abdul Majud Puling v Great Eastern Railway Co Punchoomones v Troylucko Punjab Singh v Ram Autar Purnachandra v Nabin Chandra	102 105 237 7 357 94 104 356 80A 96 361
Padma Priya v Dharmadas         38 365           Padman v Hanwanter         76           Pakisan v Ignasi         39           Palan v Veerammal         233           Palan pana         233           Palam v Perammal         233           Pallam v Bapanna         23           Panchu Gopal v Kahdas         187 395           Pandurang v Vinayak         67 8 88           Pa Warkadas         271	Pubitra Dasi v Damoodar Pulliah Cheti v Varadarajulu Pulin Behari v Abdul Majud Puling v Great Eastern Railway Co Punchoomones v Troylucko Punjab Singh v Ram Autar Purnachandra v Nabin Chandra	102 105 237 7 357 94 104 356 80A 96 361
Padma Priya v Dharmadas   38 36 26	Pubuta Dasi v Damoodar Pulliah Chet v Varadarajulu Pulin Behari v Abdul Majud Pulin Behari v Abdul Majud Pulin Behari v Abdul Majud Puling v Great Eastern Railway Co Punjab Singh v Ram Autar Pumanandhachi v Gopaliswami Putubari v Sorabji Padamanan v Topal Radharani v Brindaban Radharani v Bubraya Radha Prasad v Rammoni 123 Radhika Mohan v K S Bonnerjee Radha Pasad v Ramunani Radhari v Radha Prasad v Raminani Radhari v Radhari Radhari v Bilma	102 103 237 7 94 104 356 80A 96 80A 96 361 125 328 346 412 429 293 236 55 57 106 101 102 1332A 145 237 146 237
Padma Priya v Dharmadas   38 36 26	Pubuta Dasi v Damoodar Pulliah Chet v Varadarajulu Pulin Behari v Abdul Majud Pulin Behari v Abdul Majud Pulin Behari v Abdul Majud Puling v Great Eastern Railway Co Punjab Singh v Ram Autar Pumanandhachi v Gopaliswami Putubari v Sorabji Padamanan v Topal Radharani v Brindaban Radharani v Bubraya Radha Prasad v Rammoni 123 Radhika Mohan v K S Bonnerjee Radha Pasad v Ramunani Radhari v Radha Prasad v Raminani Radhari v Radhari Radhari v Bilma	102 103 237 7 94 104 356 80A 96 80A 96 361 125 328 346 412 429 293 236 55 57 106 101 102 1332A 145 237 146 237
Padma Priya v Dharmadas   38 36 26	Pubuta Dasi v Damoodar Pulliah Chet v Varadarajulu Pulin Behari v Abdul Majud Pulin Behari v Abdul Majud Pulin Behari v Abdul Majud Puling v Great Eastern Railway Co Punjab Singh v Ram Autar Pumanandhachi v Gopaliswami Putubari v Sorabji Padamanan v Topal Radharani v Brindaban Radharani v Bubraya Radha Prasad v Rammoni 123 Radhika Mohan v K S Bonnerjee Radha Pasad v Ramunani Radhari v Radha Prasad v Raminani Radhari v Radhari Radhari v Bilma	102 103 237 7 94 104 356 80A 96 80A 96 361 125 328 346 412 429 293 236 55 57 106 101 102 1332A 145 237 146 237
Padma Priya v Dharmadas   38 36 26	Pubuta Dasi v Damoodar Pulliah Chet v Varadarajulu Pulin Behari v Abdul Majud Pulin Behari v Abdul Majud Pulin Behari v Abdul Majud Puling v Great Eastern Railway Co Punjab Singh v Ram Autar Pumanandhachi v Gopaliswami Putubari v Sorabji Padamanan v Topal Radharani v Brindaban Radharani v Bubraya Radha Prasad v Rammoni 123 Radhika Mohan v K S Bonnerjee Radha Pasad v Ramunani Radhari v Radha Prasad v Raminani Radhari v Radhari Radhari v Bilma	102 103 237 7 94 104 356 80A 96 80A 96 361 125 328 346 412 429 293 236 55 57 106 101 102 1332A 145 237 146 237
Padma Priya v Dharmadas   38 36 26	Pubuta Dasi v Damoodar Pulliah Chet v Varadarajulu Pulin Behari v Abdul Majud Pulin Behari v Abdul Majud Pulin Behari v Abdul Majud Puling v Great Eastern Railway Co Punjab Singh v Ram Autar Pumanandhachi v Gopaliswami Putubari v Sorabji Padamanan v Topal Radharani v Brindaban Radharani v Bubraya Radha Prasad v Rammoni 123 Radhika Mohan v K S Bonnerjee Radha Pasad v Ramunani Radhari v Radha Prasad v Raminani Radhari v Radhari Radhari v Bilma	102 103 237 7 94 104 356 80A 96 80A 96 361 125 328 346 412 429 293 236 55 57 106 101 102 1332A 145 237 146 237
Padma Priya v Dharmadas         38 365           Padman v Hanwanter         76           Pakisan v Ignasi         39           Palan v Veerammal         233           Palan pana         233           Palam v Perammal         233           Pallam v Bapanna         23           Panchu Gopal v Kahdas         187 395           Pandurang v Vinayak         67 8 88           Pa Warkadas         271	Pubuta Dasi v Damoodar Pulliah Chet v Varadarajulu Pulin Behari v Abdul Majud Pulin Behari v Abdul Majud Pulin Behari v Abdul Majud Puling v Great Eastern Railway Co Punjab Singh v Ram Autar Pumanandhachi v Gopaliswami Putubari v Sorabji Padamanan v Topal Radharani v Brindaban Radharani v Bubraya Radha Prasad v Rammoni 123 Radhika Mohan v K S Bonnerjee Radha Pasad v Ramunani Radhari v Radha Prasad v Raminani Radhari v Radhari Radhari v Bilma	102 103 237 7 94 104 356 80A 96 80A 96 361 125 328 346 412 429 293 236 55 57 106 101 102 1332A 145 237 146 237

	Not	e No	Note N
Rajanikant v Makhan Lal		240	Ranganadha v Bhagaratha
Rajan Chetty y Edalapalli		417	Rangini y Debendra 34
Raja of Kalahasti v Ran	13		Ranmaya v Betty Mahbert 29
Rayaniengar		419	Ratanbai v Narayandas 224 35
Rajmohinee v Dinabandho		425	Ratansı v Administrator General 26 36
Raj Dulari V Krishna Bibi		2224	221 24
Raj Narani v Pukuman	100	3344	Rattan Singh V Chaudhuri Raj
Rajamanikam v Farrar	102	340	Patancham v Barranu 408 412 42
Raiah Parthasarathy v Rais	h	010	Ratan Chandra & Municipal
Venkatadrı 221 351	354	382	Committee 35
Rajanikant v Liko		169	Ravn v Vishnu 310 31
Rajarama v Fakmddin		221	Richard Ross v Durga Prasad (p 3)
Rajan v Natarajan		130	Ridhu Ram v Teju Mal - 100
Rajammal Authiammal		6A	Robson v Administrator General 221 354
Rajamannar v Venkata Krisi	1 205	000	Rooplall v Mohima Charan 360
nayya 191	195	202	Romesh v Kamini 408
Ramadae s Premdee		320	Dubman at Corn Dec. 412 412
Rambhat w Lakshman		64	Run Rahadoor s. Raumo Loor 221
Ram Chand v Rukman		425	Runan v Bhagela 421
- v Diwan		90	Rustomu v Nurse 355
Ram Ghulam v Shib Din		425	
Ram Luar v Sardar Singh		410	1
Ram Lal v Chandan Das		251	} S
- v Secy of State	100	102	C-b Md 200
- V Kanar Lai	200	352	Sabju v Noordin 232
Ram Proced v Recentia	366	69	Sadagana v Thinimala Swami 926
Ramasamy v Auppusamy		167	Sagore Chandra v Digamber 64 51 63
Ramasami v Veerappa		353	Sahib Mirza v Umda Khanam 71 173
Ramu Singh v Aghori		421	Sahadev v Sakhawat 233 237
Ramchode v Rukmany		357	Sahib Ram v Covindi 235
Ramdhon v Sharfuddin	361	362	Sailoja v Jadunath 343 362
Ramanandi V Rajawati	210	330	Saliabala v Baldyanath 247 255
Ramani Debi v Kumuu banunu	210	340	Sakharam w Venavel 215 216 210
Pamagin v Govendamma		323	Sakina Bibee & Mohamed Ishak 230
Ramanatham v Ragammal	282	332	Sakhi v Ram Lissen 240
Ram Chand In the goods of		280	Sala Mohamed v Damejan bai 43 50 109
Ram Chandra v Ramdas		231	Samarendra v Birendra 10
- v Bapu		237	Sallay Mahomed v Dame Janbai 109
v Vijayaragnavalu		124	Cantoch t Posto 12 14 15 16
Pam Mony v Ram Gonal		6A	Sankara Narayana v Konpaya 101 117
Ram Naram v Ram Chandra		237	Sankara Namar 420
Ram Rai v Brit Nath	415	417	Santaji v Ravji 231
Ramagiri v Govendamma		241	Sarah Ezra In 1e 26
Ramanugrah v Chum Lal		231	Saradindu y Sudnir 37 43
Ramcharitar v Ram Narain		226	Satolini & tracidas 37 38
Ramanian v ranuas		129	Sarat Chandra v Gopal Sundan 76 262
Pamasamy v Kupnasamy		121	- v Benode Kumarı 38 345
Ramutti v Padmanabha		237	- 1 Pramatha 373 384
Ramayya v Mahalakshmi		194	Sarat Kuman v Sakhi Chand 38 50 279
Ramsingh v Murtibai	400	400	- 1 Sadavisa 80A
Ram Saran v Gappu	408	328	- v Danipenora 220 222 - v Nani Mohan 247 257
Panchordas y Rhagubhai		232	v Railakshmi 251
Rangayya v Sheshappa		38	Sarada Prasad v Trigunacharan 59
Rangoo v Harisa		99	291 295
Rangial v Annu Lal		236	Sarajubala Devi v Jyotirmoyee
Ranjit Singh In Te	272	200	Sandar Namou tr Putlibar 03 145
— \ Jagannath	613	ADM*	Ranganadha v Bhagurathi Rangin v Debendra Rangin v Betty Mahbert Rangin v Bananan Rangin v Rangin kasa 422 42 Rattan Singh v Chaudhuir Raj Ringh Rangin v Bananani Ratin Chandra v Municipal Committee Rayin v Vishun Rochard Ross v Durga Prasad (p 3) Rothur Ram v Teju Mal Rochard Ross v Durga Prasad (p 3) Rothur Ram v Teju Mal Rochard Ross v Bananan Romesh v Kamin Romesh v Kamin Romesh v Kamin Romesh v Kamin Rose Learmouth in the maliter of Rukman v Sain Das Rose Learmouth in the maliter of Rukman v Sain Das Rose Learmouth in the maliter of Rukman v Sain Das Rose Learmouth in the maliter of Rukman v Sain Das Rose Learmouth in the maliter of Rukman v Sain Das Rose Vallagun v Bananan Sachindra v Hirorimoroyee Sadagopa v Thriumala Swami Sagore Chandra v Digamber Sarinb Mirza v Umda Abanan Rangin v Budadi Sakhu v Ram Kissen Salida w Sakharan v Vinayal Sakharan v Rangin Salad Mohamde v Dame Janbar Sakharan v Nannar Sandand v Dame Janbar Sakharan v Nannar Salad Mohamde v Dame Janbar Sakharan v Nannar Salad Mohamde v Dame Janbar Sakharan v Nannar Sandara v Rangin Sandara v Rangin Sarah Caragin Sakhu Chand Sara Caradandra v Sudhr Saradandra v Sudhr Saradandra v Sudhr Sarada Prasad v Tingunacharan V Pranakha Sarat Kuman v Sakhu Chand Sarada Prasad v Tingunacharan V Pranakharan V Pranak

Note N	10	No	TΕ	N
sartaj v Mahadeo sarta Sundari v Uma Prasad saroja Sundari v Abhoycharan saroda Sundari v Abhoycharan saroda Sundari v Aristo Jiban saroda Sundari v Subbere saroje Bashim Ia re saroje Bashim Ia re v Nani Mohan Sarojini v Rajlakshimi Sarah Ezra Sarah Ezra Sasiman v Shib Narayan Sasihes Bhushan In the goods of Satyaranjan v Annapurna Sato Gogal Satya Satis Chandari v Sarat Sundari Sato Copal Satya Copal 209 213 214 215 Satya IV Collector Satya Collector	12	Shookmov v Monohari 90 127 1	33	16
aret Sundan v Uma Prasad 289 37	ro l	Shoroshibala v Anandamovee 291 2	96	32
Sarora Sundari s Abhovcharan 296 33	18	Shrivell In the goods of		32
Coroda Kanta a Cohinda 311 312 318 33	37	Shri Beharilalii v Bai Raibai		36
Parada Sundari v. Kristo Jihan 104 10	16	Shina Ali v Ram Kanar		23
Sarbash a Unandonal	23	Shire Yin v Ma On		24
Sarbesh ( Hathdoyau 272 26	24	Shuama Charan at Samue Chandra		12
V Framania 575 30	13	Shih Sahita v Callacter		10
Saraswatti V Subolet	20	Shib I al chan w Tamanan		ί.
Daroje Dashini In ie	1	Shetal Chandra is Manie		92
Sarada Prasad v Triguna Charan 245 29	ne i	Change of Paners		20
22 24.5 047.75	27	Silyannai v Raineswari		30
— v Nani Monan 247 Z	241	Sibosinori V Hemangini		-5
Sarojini v Rajlakshimi 2	24	Sir Matiomed Tustit v riargovandas		30
Sarah Ezra 30	A	Sn.n Chandra v Bhabatanni		29
Sasiman v Shib Narayan 81 10	120	Sisir Chandra V Ajit Kishore 80	)A	13
Sashee Bhushan In the goods of 2	57	Sita Noer v Munshideo		6/
Satyaranjan v Annapurna 14	45	Sital Prasad v Prabhulal		4
Satish Chandra v Sarat Sundari 146 14	49 I	Sitasundari v Barada		36
Sato v Gopai 209 213 214 215 2	19	Sithambaravadiva v Thirupal		
Satpal v Collector 23	79	kadanatha		42
Sation V Collector Satindra v Saroda Sundari Satya Prasad v Mothal 240 34 Saytri v F A Sain Sayed Mohamed v Fatteh Moha	28	Sıvamma v Subbamma 4	12	41
Satva Prasad v Motilal 240 36	66 I	Sivadas v Surendra 2	77	27
Savitri v F A Sain 56 60 6	61 l	Siva Sankara v Amarabathi	2	48/
Saved Mohamed v Fatteh Moha	- 1	Smith v Massey 24	25	13
med	49 l	— v Gokulchandra		22
Saved Ahmed v Bunyadı 2	31	Sobha Singh v Fatta		239
Saved July V Sitaram 3	55	Sobhag Ranı v Lado Ranı		31
Seale v Brown 3	59 l	Sohan Singh v Bhag Singh		229
Secv of State v Firm Giridharilal 1 2	37	Sohan Bibi v Hiran Bibi		76
1 Parnat 114 231 2	32	Soma Sundara v Ganga Bissen		90
Satpal   V   Collector   Saturdar   V   Saroda Sundar   Saturdar   V   Saroda Sundar   Savartra   F   Saroda Savetra   F   Saroda Savetra   F   Saroda Savetra   F   Saroda Savetra   Sa	33	Sooramma v Yarabatı		88
Seshamma v Chennappa 2	48	Soorieemany Dossee v Dinobundoo		_
Seshayya y Subban 3	53	Mullick	32	154
Shadi Ian v Waris 2	35 l	Mullick Sophia v Maria Soshee Bhusan Banerjee In the	82	82
Shah Makhanlal v Baboo hishen		Sophia v Maria		29
Singh 1	95	Soshee Bhusan Baneriee In the		
Shehab ud din v Fazal Din 332A 3	15	goods of		247
Shark Moosa v Shark Essa 222 230 2	51	Soudaminey v Jogesh		109
Shama Charan v Rebala 2	91	Soundara Ranjan v Natarajan 128 13	30	165
v Prafulla 291 293 296 322 327 3	28	Soudamini v Teniram		366
Shamsul Huda v Shewakram 1	04	- v Jogesh		109
- v Sarup 154 1	58	Sowbhagiammai v Komalangi 32	28	340
Shapuru x Rustomu	34	Sree Chand v Kasi Chetty 12	22	138
Shanker v Manunath 1	54	Srish Chandra v Kadambini		138
Sharifunnissa v Masem 2	32	Snmvasa v Ranganayakı		232
- y Masum Alı 234 424 4	52	Srinivasa v Sundararaja		234
Sharafat v Khurshed 4	21 l	- v Man Mohini		82
Sheetal Chandra v Lakshmimanee 2	37 l	Srinivasa Chariar v Ramaswamy		412
Sheikh Sahebian v Sheikh Abdul 2	38	Srigobind v Laljhari 29	2	328
Sheikh Azim v Chandranath 291 3	28	Srish Chandra v Bhabatanni 29	19	301
Sheo Gopal y Sheo Ghulam 291 2	94	Srimati Basini v Arishnalal		49
Shermahomed v Dy Commissioner	53	Sn Ram v Mohamed Abdul Rahim	. 8	30A
Sheo Shankar v Mithana	94	Stamp Reference		6A
Sheoparshan v Ram Nandan 2	89	Subramaniyan v Ramaswarm		370
Shewnarain In to 3 2	61	Subroya v Rangammal 294	3.	ZA
Sniam Sundar v Jagannath 9 3	865	Subramania v Venkataramier	-	357
Shib Lakshan v Tarangini 90	93	Supragra v Chandra Kumar	-	363
Shital Chandra v Manik Chandra 231 2	34	Subramania V Murugesa	_ :	130
Shirin Bai v Ratanbai 1	03	— v Subramania 13	5	137
Shitab Dei V Dei Prasad 234 414 4	25	\ Rekka 23	3	237
Shiv Shankar v Methana Kuar 1	106	Subbanna v Munekka	-	232
Shiv Deb v Ajudhya 4	17	Supparayar v Suppammai		85
Snibram \ \lonamed 4	ZI	Subpa Reddi V Doraisami	颂	/0
Shadi Jan v Wans Shah Makhanial v Baboo kishen Singh Shah Makhanial v Baboo kishen Singh Shah Makhanial v Baboo kishen Singh Shahab Ud din v Fazal Din 332A 3 Shaik Moosa v Shaik Essa 222 230 2 Shamac Harara v Rebala — v Prafulia 291 293 296 322 327 3 Shamsul Huda v Shewakram — v Sarup Shamsur v Maununath Shanduransa v Missem — v Masum Al Sharifunissa v Sheikh Abdul Sheikh Sheiban v Sheikh Abdul Sheikh Asim v Sheikh Abdul Sheikh Asim v Hudana Shemahomed v Dy Commissioner Sheoparshan v Ram Nundan Sheoparshan v Ram Nundan Sheoparshan v Ram Nundan Shewaran In 16 Shian Sundar v Jagannath 9 3 Shian Sundar v Jagannath 9 4 Shian Sharkar v Muthana Shian 9 4 Shian Sharkar v Muthana Sun 9 5 Shian Sundar v Jagannath 9 5 Shian	QA.	Squiii Chandra V Goqinqa	30	44

1	Not	e No		Not	e No
V Basseswari     v Uttari Sundari     suddasook v Rama Chandra Sudhamani v Surat Lal Sughra Begura v Mohammad Mir Khan Sukha v S cy of State Sukha v S cy of State Sukha v Rennick Sukha v Rennick Sukhara Tarini Sulochana v Jagat Tarini Sulochana v Jagat Tarini Sundarammal v Kullappa Sunder Singh v Laram Singh Sunderdas In # Sunderdas In # Sunderdas In # Sunderdes V Nemye Charan Sund Kumar v Stark Kumar		364A	Troylucko Nath v Administrato	r	
- v Uttarı Sundarı		256A	General		243
Suddasook v Rama Chandra		351	Tribhawan v Deputy Commissione	ţ.	71
Sughra Berger at Mohammad Mar		109	Tribhuyandas v Yorke	198	200
Khan		234	Tulchi Dobi a st Biblioti		330
Sukhia v S cs of State 424	426	429	Tulsha v Mathuranun		200
Sukh Nandan v Rennick		224	Tulsan v Pavre Lal		259
Sukumar v Rajeswari		252	Turi Oraon v Leda Oraon		8 26
Sulochana v Jagat Tarını		106	Tincouri v Krishna Bhabini		158
Sundarammal v Kullappa	410	417			
Sunder Singh v Maram Singh	410	416			
Sindaree v Nemye Charan Sunil Kumar V Siari Kumar Surendra v Amrita Lal 299  V Ram Sura Ramar Sura Prade v Shyama Sundari Sura Prade v Shyama Sundari Surbomongala v Shashibhooshan  V Mahendra Surendra V Upendra  V Saraj Bandhu  V Ram Dasi  V Janaehuchara  V Janaehuchara  V Janaehuchara  V Janaehuchara	410	2/1			
Sund Kumar v Sier Kumar		361	U		
Surendra v Amrita Lal 299	301	332	Hidho Sinch v. Mohr Chand		95 A
- v ka imoni	001	DUR	Udit Singh v Amar		110
- 1 Rani Dassi	3	8 78	Ullan Das v Chanan		76
Surja Prasad v Shyama Sundan		312	Uma Charan v Rakhal		6A
Surajmani v Rabinath		102	- v Muktakeshi		345
Surbomongala v Shashibhooshan		328	Uma Kanta v Biswambhar		59
V Manendra		97	Umesh Chandra & Mothur	9 001	000
Surentia V Openina		200	II De Unit is Maurice Do Can 224	231	233
- v Rani Dasi 37 38 4	2 4	9 78	Hittam Das v Charan	340	76
- v Jnanendra		38	U Shwe v Maung Gvi		339
- v Jahnabicharan		38	Uttam Devi v Dina Nath	241	323
- V Sivadas		68			
Suramma v Yarabatıvarahalu	104	48			
Sures v Lant Monan 91	104	7 10	37		
— v Stvadas Suranma v Yarabatıvarahalu Sures v Lalıt Mohan Susil Kumar v Apsarı — v Samendra Sushilabala v Anukul Chandra Syama Charan v Prafulla Syed Ahmad v Bunyadı Syed Ahmad v Bunyadı Syed Ahmad v Durassam Swannatha v Durassam Swannatha v Durassam Swannatha v Secy of State	IA S	401R	V		
Sushilabala v Anukul Chandra		253	Vaidvanatha v Chinnaswami		237
Syama Charan v Prafulla		296	Vairavan v Srinivasa	236	410
Syed Ahmad : Bunyadı		231	Vallımayajam v Pachepe		63
Syed Abdul v Badaruddin	61	230	Vanghan v Heseltine		361
Swaminatha Courses of State	81	24E	Varadarujuti v velayuda		237
Swarnamoyee C Sety of State		010	Vellacami v Sivaraman	38	50
			Veerabhadra v Chirannyi	-	151
		- 1	Venidas v Ba Champabai		328
T			Venkataramanna v Venkayya		237
C 00 05	102	120	Vasquez v Pragi Vellasami v Sivaraman Veerabhadra v Chiranjivi Venidas v Ba Champabai Venkataramanna v Venkatya Venkataramanna v Venkataramanay vamma		67
Tagore v Tagore 90 95 Tara Chand v Emperor  v Debnath	102	1 30			
Tara Chand v Emperor v Debnath Tara Charan v Suresh Chandra Taral Chandra v Satya Charan Taran Singh v Ram Ratan Taruck Nath v Prasonno Tarokessur v Soshshikhuressur Talu Ram v Badnnath Tayaranma v Sitaramasam		326	- 1 Pitamma	011	195
Tara Charan v Suresh Chandra		85A	Venkata Chalam v Govinda Swami		6A
Tarak Chandra v Satya Charan	213	214	Venkata Krishnaya v Annapurni		37
Taran Singh Ram Ratan		82	Venkataramiah v Subramanian		118
Taruck Nath v Prasonno		102	Venkataranner v Govinuarayaner		253
Talu Pam v Badanath		37	Venkatasami v Chinna		426
Tayaramma v Sitaramasami	146	150	- s Subbarayudu		300
Taylor > Shore		257	Venkateswarulu v Brahmaravutu		425
Tellis v Saldanha		26	Venkat Rao v Namdeo		52
Thakur v Basoodeb		100	Venkata v Baggiammal		38
Talu Ram v Badnnath Tayaramma v Staramasam Taylor v Shore Tellis v Saldanha Thakur v Basoodeb  - v Jamra Thakur Isn Singh v Thakur Baldeo Singh Thakur Isn Singh v Thakur Baldeo Thakur v Lampa Thakur Isn Singh v Thakur Baldeo Thakur v Lampa Thakur v Lampa Thakur v Lampa Tooley day v Premp Tulsha v Mathuranur		102	Vinasaka v Sakharam		38
Sinch		6A	Vijavaratna v Sudarsana		3
Thakur v Arva Pritimidhi		68	Vishvanath v Yulraj	:	232
Tikaya v Launga		426	Vithal v Narayan		96
Tiratthmal v Thanwar Singh	40	102	- V HanJmantha	- 3	232
Toolseyday v Premji	49	113	Vundengandae v Currendae	07 1	112

	Note No		Note	No
W		Y Yakub Khan v Azızunnıssa		121
Wajid Khan v Ewaj Ali William Robins v National	Trust	Yazırul Hassan v Abdul Yashvantıbaı <i>In te</i> Yethiranılu v Mukunthu	243 117	239 269 118
Coy Ltd Wilson In the matter of	335	Yorke Smith v Tribhuvandas	***	90
Winsor v Winsor Woomesh v Rashmohimi	350 38 320	Z		
Woolmer v Mrs Daly Woolmer v Mrs Daly	42 58 42 58	Zafter Alı v Kantı Prakash Zahur Mıan v Puran Sıngh Zollıkofer Cox v Chettyar	233	235 231 363

# THE

# INDIAN SUCCESSION ACT

### ACT NO XXXIX of 1925

RECEIVED THE ASSENT OF THE GOVERNOR GENERAL ON THE 30TH SEPTEMBER 1925

An Act to consolidate the law applicable to intestate and testamentary succession in British India

Whereas it is expedient to consolidate the law applicable to intestate and testimentary succession in British India, It is hereby enacted as follows —

Not an amending but a consolidating Act —It should be noticed that the word amend does not occur in the preamble —This is merely a consolidating statute not an amending one

"The object of this Bill is to consolidate the Indian Law relating to succession. The separate existence on the Statute-book of a number of large and important enactments renders the present law difficult of ascrtainment and there is therefore every justification for an attempt to consolidate it. The Bill has been prepared by the Statute Law Revision Committee as a purely consolidating measure. No intentional change of the law has therefore been made.—
Statement of Objects and Russons

Many of the opinions elected on circulation of the Bill involve amendments of the existing law and this, in our opinion is outside the scope of the Bill which has been referred to us. The Bill is purely a consolidating Bill and some of those who have submitted opinions have clearly treated it as such and it would not be advisable for us or within our competence to consider amendments of the existing law in connection therewith—Report of the Joint Committee

The enactments which have been consolidated in this Act hav, been shown in Schedule IX Suggestions were also made to consolidate the Hindu Disposition of Property Act and other minor Acts but these were not accepted by the Joint Committee as will be evident from the following report —

Suggestions have been made for the inclusion of the undermentioned cuactiments in this Bill but for the reasons hereunder given we are not of opinion that these should be consolidated with the present Bill

The Hindu Disposition of Property Act 1916 —As only a part of the Act relates to succession the consolidation of this portion alone would not simplify the Statute book as section 5 of the Act cannot suitably be included in the amending Bill and this section requires that the provisions of the Act relating to succession should continue to be enacted therein

The Special Marriage (Amendment) Act 1923 —The principal Act is of special application, and it is advisable that even the rules of succession appli-

cable to persons who marry under that Act should be enacted in the special Act which deals with the status of such persons

The Wills Act 1838 and the Inheritance Act 1839 —These relate only to wills and intestaces occurring before the 1st January 1866 and in all probability will be seen at an early date

The Legal Representatives Suits Act 1855 —This cannot wholly be included in the consolidating Bill the provisions of the Act are substantially reproduced in the Bill but we have decided ex majori cautela not to repeal the provisions of this Act.

We agree with the Statute Law Revision Committee that it would be difficult to incorporate the provisions of the *Indian Fatal Accidents Act* 1855 in the consolidated Bill

The Oudh Estates Act 1869 and the Molabar Wills Act 1898 —These are encurrents of local interest which would not properly find a place in a general consolidating enactment. This applies all o to Bombay Regulation VIII of 1827.—Report to the Joint Committee

Scope of the Act —The Act deals with the rules of law applicable to include the act of the state and testamentary succession in British India and also with the devolution of rights on the death of an individual it does not purport to enlarge the category of heritable property nor does it affect the rights of coparcenership a between those to whom it applies—Francis v. Gabri 31 Bom 25 Mukherji v. Alfred 36 PR 1809 Abraham v. Abraham v. Mil. 185 237

Succession Act and Probate and Administration Act —The Indian Succession Act of 1885 and the Probate and Administration Act of 1881 Faye now been both repealed by the Succession Act of 1925 (XXXIX of 1925)

Intestate and Testamentary Succession —The provisions of the Succession Act are not confined to intestate succession but are also applicable to cross of testamentary succession—Benode Behart v. Rai Sundan 55 Cal 637 Si C WN 500 AIR 1926 Cal 779 94 IC 589 Champi Deri v. Puran Bal 189 IC 686

Reference to Preamble —The preamble may always be referred to for the purpose of ascertaining generally the scope of the Act where the enacting words are ambiguous But where the language of the vection is clear and un ambiguous a preamble cannot control its provisions—Debendra l'aran 1 Jogendra Narain A I R 1936 Cal 593 Raipali v Sarju 1936 A L J 659 A I R 1936 All 507 163 I C 756 (F B)

Interpretation of Code —The essence of a Code is to be exhaustive on matters in respect of which it declare the law and it is not the province of a Judge to disregard or go out det the letter of the enactment according to its true construction—Gokul v Pudmanund 29 Cal 707 (P.C.) Sections should be constructed according to the plain meaning of its language unless either in the section itself or in another part of the Act can be found what will either modify or qualify or alter the statutory language—Rayeb v Lakhan 27 Cal 11 It is a clear principle of law that when there is a conflict between a special statute dealing with a special kind of property it is by the former that the rights of the parties must be governed with regrid to the special kind of property. The provisions of the special Act must prevail against those of the later Act which is a general one on the well recognised maxim generalia specialibus non detogrant—Ramchaudra v Julgarantae 40 Born LR 40 Born LR 40 Born LR 400 Born

An English case interpreting an Act of Parliament is no guide for the interpretation of a section of an Indian Projuncial statute especially where the vordings in the two Acts are different—Tarachand v. Emperor 175 I C 834

The Act if retrospective in operation —It is a cardinal rule of legal interpretation that statutes are not to be interpreted so as 1-3 have a retros pective operation unless they contain clear and express words to that effect or the object subject matter or context shows that such was their object. Retros pectivity is never presumed and a law is regarded as retrospective, only when it is so by express enactment or it is a necessiry implication by the language employed by the Legislature the presumption always being against the taking away of vested rights—Bank of Chettinad v. Ma Ba Lo 14 Rang 494 ATR 1936 Rang 152 163 IC 645 Debendra Nation is presented by the control of the state of t

The Succession Act of 1925 has no retro pective effect and does not apply to a will executed before it came into operation—Richard Ross v Durga Prasal 31 All 239 3 IC 66 Bhim Rao v Punnah Rao 18 NL J 1 158 IC 1042

Applicability of the Act to Foreigners —There are no word in the Succession Act as it now stands limiting the Act to British subjects as opposed to foreigners—Amar Singh v Sham Singh 37 PLR 502 AIR 1935 Lah 646 160 IC 531

Law applicable to converts —The question what law would govern the converts came for decision before their Lordships of the Privy Council in the case of Abraham v Abraham 9 MIA 194 Their Lordships observed That upon the conversion of a Hindoo to Christianity the Hindoo Law cesses to have any continuing obligatory force upon the convert He may renounce the old law by which he was bound as he has renounced his old religion or if he thinks fit he may abide by the old haw, notwithstanding he has renounced the old religion. The profession of Christianity releases the convert from the trammels of the Hindoo Law but it does not of necessity involve any change of the rights or relations of the convert in matters with which Christianity has no concern such as his rights and interests in and his power o er property

1 Not applicable to Crown —This Act does not apply where the poperty vests in the Crown by eisheat by rea on of ultimate failure of heirs. It cannot be called a case of succession. Escheat is the vanishing point in the law of inheritance. Where succe sion ends eisheat begins—Secretary of State v Firm Girdhari Lal. 54 All. 226 1932 AL J. 150 AIR 1932 All. 220 (223) 136 I C 555.

Construction —Although the Indian Succession Act to a large extent embodies the rules of English law on the subject yet it departs in many particulars from those rules and in the progress of the development of the law and practice in testamentary cases the ecclesiastic origin of this jurisdiction of the Courts in England has been completely discarded. And the Ividian Legislature las gradually evolved an independent system of its own larg ly suggested no doubt by English law but also differing runch from that law and praproting to be a self contained system. In applying this Act to testamentary cases the proper course is to examine the language of the statute to find cut the relevant section of the Act and to ascertain its proper meaning uninfluenced by any consideration of rived from the previous state of the law or of the English law upon which it may be founded—Pennandi v. koliacuta; 7 Pat. 22 (PC) 9 PLT 97 AIR 1928 PC 2 (4) 107 IC 11 following Altrivi lain v. Nithat uddorful 33 Gal 116 (PC)

#### PART I

#### PRELIMINARY

Section 1, Act X of 1865 Section 3 Art X of

URSA

Short title

Definitions

This Act may be called the Indian Succession Act. 1925

In this Act, unless there is anything repugnant in the subject or context,-

- (a) "administrator" means a person appointed by competent authority to administer the estate of a deceased person when there is no executor.
- (b) "codicil" means an instrument made in relation to a will, and explaining, altering or adding to its dispositions, and shall be deemed to form part of the will.
- (bb) "District Judge" means the Judge of a principal civil Court of original jurisdiction,
  - (c) "executor" means a person to whom the execution of the last will of a deceased person is, by the testator's appointment, confided,
  - (d) "Indian Christian" means a native of India who is, or in good faith claims to be, of unmixed Asiatic descent and who professes any form of the Christian religion.
  - (e) "minor' means any person subject to the Indian Majority Act, 1875, who has not attained his majority within the meaning of this Act, and any other person who has not completed the age of eighteen years, and "minority" means the status of any such person,
  - (f) "probate" means the copy of a will certified under the seal of a Court of competent jurisdiction with a grant of administration to the estate of the testator.
  - (a) "province" includes any division of British India having a Court of the last resort, and
  - (h) "will" means the legal declaration of the inten tion of the testator with respect to his property which he desires to be carried into effect after his death

Section 2 Act VII of 1901

Section 3 Avt V of

This section corresponds to see, 3 of the Indian Succession Act 1865 and to ec. 3 of the Probate and Administration Act 1881. The words have been arranged alphabetically and certain definitions have been original. The reasons for the omission have been thus strited. The General Clauses Act 1897 (N of 1897) will apply to this Bill. The definitions, therefore of person year month rumoveable, property moveable property Local Government and High Cort are unnecessary and are omitted. The definition of British India has also been omitted as the definition in the General Clauses. Act appears more suitable and does, not change the sub lance of the INF.—Notes on Clauses.

2 Codicil —A codicil is an addition to or alteration of his will made by a testator and annexed to and to be taken as part of his testament—Codolphin Part I c 6 s. 1 A codicil is part of the will making together one testament—Fuller v Hooper 2 Ves. Sen 222 (per Lord Hardvicke) A document signed by the testator which came into the hands of the trustees at the me time and under the same circumstances as the will itself and gave directions to the trustees is a codicil though there is no reference to the will itself.—Ram Dulan v Binkutshear 18 N.LR. 143 AIR 1923 Nag 105 (106)

The effect of a coded is to bring the will down to the date of the coded and to effect the ame disposition of the testator's property as would have been effected if the testator had at the date of the coded made a new will containing the same disposition as in the original will with the alterations introduced by the coded—Coontwardene v Goonwardene [1931] AC 647 AIR 1931 (PC) 307 (308) Re Champion [1893] 1 Ch 101.

Where a coded is properly attested and executed it is entitled to probate by the action of the may be dependent by its language on an unattested will—Gardiner v. Courthobe 12 PD 14

District Judge —The definition of District Judge which existed in the Act of 1865 was excluded from the Act of 1925 but has been restored by the Indian Succession Amendment Act XVIII of 1929 on the following grounds —

The Indian Succession Act 1865 contained in sec 3 a definition of the expression District Judge which was wide enough to include and was always held to include a Judge of the High Court exercising probate jurisdiction on the Original Side. The Consolidating Act of 1825 omitted this definition with the result that the expression District Judge cannot be held to include a High Court in the exercise of its ordinary or extraordinary civil jurisdiction in view of the definition contained in the General Clauses Act 1827. As the Indian Succession Act of 1825 now stands numerous powers contained therein and given to District Judge have not been given to the High Court on its Original Side. This effect of the omission of the definition of District Judge from the Act of 1825 was apparently not foreseen and it is proposed to restore it.—Statement of Objects and Reasons (Gazette of Indian 1825 Part V p 209).

By rea.on of this amendment the word District Judge will now include a High Court And as a further result of the amendment the High Court is now enabled to grant succession certificates—In re Bholanath Pol 58 Cal 801 35 CWN 122 (124) AIR 1931 Cal 580 In re Aroonackellam 9 Rang 205 AIR 1931 Rang 281 135 IC 80 Even before the amendment the Madras High Court was of opinion that the expression District Judg as defined in the General Clauses Act included a High Court and that the High Court was the refore competent to grant a succession certificate—In re Kuppuswami 53 Mad 237 59 MLJ 17, AIR 1930 Mad 779 (781 782)

ukram 22 WR 409 (PC) a petition presented to the Collector in which the petitioner recited his intention to dispose of his properties to certain named persons after his death was held to be in the nature of a testamentary instru ment So also where a sonless Hindu widow in postession of her deceased husband's estate as such made a statement before a revenue official which was recorded by him to the effect that she wished the property to go after her death to her nephew and that S the person entitled to succeed her had no right to the property held that such statement operated as a will in respect of the property-Kalian Singh v Sanual Singh 7 All 163 (167) Similarly where a certain person caused the following statement to be recorded in a Musammat Sohni the wife of my son Saliz Ram shall be u.a sh ul are regarded as owner after my death held that the statement recorded in the u a 1b ul arz amounted to a testamentary bequest in favour of Sohni-Mathura Blukhan 19 All 16 (18) Where a Hindu on taking a sor in adoption, executed a settlement as to what should be done by his wife and his adopted son after his death held that the instrument amounted to a will as the disposition contained in it was clearly intended to take effect after the death of the executant and the fact that the document was styled a deed of settle ment was immaterial-Lakshms v Subramanya 12 Mad. 490 (492) If the conduct of the testator and the provisions of the document show that the intention was purely testamentary the name of the document will not be very important-Rambhat v Lakshman 5 Bom 630 (636)

The fact that a paper is drawn in the form of an agreement and that it is registered as a deed of settlement are circumstances to be taken into considera to a lithough they per se do not amount to much—Rajammal v Authiammal 33 Mad 304 (306)

Characteristics of Will -In ascertaining whether a document is a will one of the tests is to ascertain whether the document is recocable or not The irrevocability of a document is perfectly inconsistent with is being a will Therefore an ekrarnama which was a family arrangement arrived at to put an end to all future disputes in relation to the family properties and which was irrevocable in its nature could not be treated as a will-Sita Loer v. Munsh: Deo Nath 8 CWN 614 (619) see also Rajammal v Authammal 33 Mad 304 (307) Brito v Rego 64 MLJ 650 146 IC 46 AIR 1933 Mad 492 (493) A Lord Penzance observes There are some tests which are applied in every case when a question is raised as to the testamentary character of a paper. One of these invariable tests is whether the paper is revocable. Apply that test and I think that this application must fail on the ground that the instrument in question is irrevocable in all its parts -In the goods of Robinson (1867) LR P & D 385 (387) If an instrument is on the face of it of a testamentary character the mere circumstance that the testator calls it irrevocable does not alter its quality-Sagore Chandra v Digambar 14 CWN 174 (177) 3 IC 380 1 snior s case (1610) 8 Coke 82 (a)

On the other hand if an instrument is clearly a non testamentary instrument the mere fact that the executant has reserved a right of recoation does not make it a will because as pointed out by Jarman in his t eatise on will the insertion of a clause of revocation so far from indicating an intention to make a will gives quite a contrary colour to the transaction as a will does not require an express power to render it revocable—Stamp Reference 20 Bom 210 (214)

Where a document (deed of settlement) contains provisions which are not of an ambulatory character the presumption will be against the testa

mentary nature of the document and the fact that such provisions are expressed to operate in the future does not affect the nature of the document—Rajammal Authanmal 33 Mad 301 (307)

Another essential characteristic of a will is that the dispositions contained in it are to take effect after the death of the executant. The principal test to be applied is whether the disposition made takes effect during the lifetime of the executant of the deed or whether it takes effect after his decease. If it to really of the latter nature at is a will at is ambulatory and revocable during lis life-Sagore v Digambar 14 CWN 174 (177) 3 IC 380 Brito v Rego 64 MLJ 650 AIR 1933 Mad 492 (493) 146 IC 46 In the goods of Morgan LR 1 P & D 214 Robertson \ Smith LR 2 P & D 43 If an in trument (deed of trust) vests the property in trustees at once it is clearly intended to have immediate operation though the provisions as to the management and the ultimate beneficial interest in the property show that it wa contemplated that its operation might extend beyond the lifetime of the executant-Stamp Peference 20 Bom 210 (213) Where the very words of the document showed that a present gift was intended that the donee was to be the owner of the gifted property from the very date of the document and this intention was evident from the fact that the document was stamped with the full value of the property the document could not take effect as a testamentary document -Uma Charan v Rakhal 46 CLJ 145 AIR 1927 Cal 756 (757) 105 IC 12 If the deed is intended to be an immediate and irrevocable disposition of al the moveable and immoveable properties of the donor the mere fact that the donor reserves for his own use during his lifetime the usufruct of some of the properties does not take away the character of a gift and lead to the conclusion that the document is a will It is a valid deed of gift-Muhammad Abdul Gham v Fakhr Jahan 44 All 301 (314) (PC) But where a person before his death made an instrument registered as a will but stamped as a deed whereby he gave his talun to his brother reserving an intere t on the whole for his own life and in half for his widow after his death and the instrument did not purport to give anybody any possession or present interest until the death of the executant and the document contained other indicia of a testa mentary character held that the reservation of the life interest in the donor did not by itself show that the document was not testamentary-Thakur Ishri Singh . Thakur Baldeo Singh 10 Cal 792 (802) (PC) followed in Venkatachalam V Govendaskams 46 MLJ 288 AIR 1924 Med 605 (606)

Where a portion of a document contained a legal declaration of the intentions of the executant with respect to property which he desired to be carried into effect after his death and other portions of the same document contained other provisions which he desired to be carried into effect during his lifetime held that the former portion amounted to a will within the reaning of this section. There was no objection to one part of an instrument operating in practing is a deed and another in future as a will—Chand Mall v Lachhim 22 All 162 (163 164); Doe of Eli abeth Cross V Arthur Cross (1816) 2 Q B 714. If one part of a document is testamentary in its character it may be presumed that the remainder if the language is capable of that construction is also intended to be testamentary—In it. homolakant 4 CLR 401 (403)

Since a will must be regarded as speaking from the death of the testator the validity with reference to the devise of any particular property must depend toon the testator s statutory or other lawful di posing power over that properly at that time—Krishna Kumari v. Rajendra 4 Luck. 122. AJ R. 1929 (P.C.) 121 (122) 116 I.C. 397

10

Another characteristic of a will is that there should be a disposition of property. A document executed by a shebait of an endowed property appointing another person as a shebait for the purpose of carrying out the sheba and other rites after the death of the former is merely a document of appointment and not a will there being no disposition of property—Chaitanya v. Dayal. 32 Cal. 1082 (1084) 9 C.W.N. 1021. Krishina Das v. Kalisunkur. 1 I.C. 216 (218). Uma Charan v. Rahkal. 46 C.L. 1 145. ALR. 1927. Cal. 755 (757).

If the property which is the subject of disposition is one in which the eventuant has no personal right the document cannot be a wil. Thus where a Mohant by means of a document disposes of property which does not belong to himself but to the idol or temple the document cannot be held to be a will—Chattanya v Davad surro.

Where a Hindu testator who was the sole coparcener of critain property made a will by which he appointed his wife and daughter his executives and in which he nominated as his son one V and directed that if he should before adopting V his wife should after his death take V in adoption and give his properties to that adopted son Held that the document was a will and not a mere non testamentary authority to adopt. It contained the appointment of executors and was executed by a testator who at its dat. had power to dispose of the property of which he purported to dispose—Venkatanarayana v Subbammal 39 Mad 107 (112) (PC)

In Oudh a statement by a Talukdar contained in a letter addressed to in Government in reply to a Government letter requesting him to submit an appli cation on the subject of primogeniture was held to amount to a will—Humpershad v Sheo Daval 3 Ind. App 259 So also a written statement by an Oudh Talukdar in reply to the inquiries by Government issued in the districts under circular orders regarding the succession of Talukdars may come within the definition of a will in section 2.06 the Oudh Estates Act (I of 1869)—Padarali v Tasadduk Rasul Khan 18 Cal 1 (6 7) (PC) A letter written by a talukdar to the Deputy Commissioner stating how the estate will devolve after the former's death amounts to a will—Dulahin Jadunath v Bisheshar 8 OWN 258 A IR 1931 PC 24 (25) 130 IC 306

7 Joint will — Two persons can make a joint will—Jethabai v Pur ahotam 45 Bom. 987 (988) 23 Bom L R 393 Where two persons make joint wills and one of them dues the survivor can revoke has will unless he has taken some benefit under the will of the deceased co-testator—Minakhi v Vishuanatha 33 Mad 406 (407) Persons may make joint wills which are however revocable at any time by either of them or by the univior

A joint will may be made to take effect after the death of both testators such a will remains revocable during the joint lives by either with notice to the other but becomes irrevocable after the death of one of them if the survivor

takes advantage of the provisions made by the other —Theobald on Wills, 6th Edn p 17

Mutual wills —In cases where each testator disposes of his property to the other the wills are termed mutual wills. They are revocable during the lifetime of either with notice to the other—Re Heves 1914 P 192

Holograph will —A will which is written by the testator himself is a holograph will A holograph will sercognized by Scotch law and can be proved a, a will although not attested. See Goods of Elliot 4 Cal 106

Will may be conditional ... The testator may make a will conditional on the taporning or not happening of a particular event. Such a will cannot take

effect if the condition be not fulfilled-Fdmondson v Edmond on 5 CWN 178 (Notes)

(1) The Local Government may, by notification Section 333 in the local official Gazette, either re-Act X of Power of Local Gov

ernment to exempt any race sect or tribe in the territories administered by the Local Govern ment from operation of

trospectively from the sixteenth day of March, 1865, or prospectively, exempt from the operation of any of the following provisions of this Act, namely, sections 5 to 49, 58 to 191, 212, 213 and

215 to 369, the members of any race, sect or tribe in the province, or of any part of such race, sect or tribe, to whom the Local Government considers it impossible or inexpedient to apply such provisions or any of them mentioned in the order

(2) The Local Government may, by a like notification, Section 2 revoke any such order, but not so that the revocation shall XXXVIII have retrospective effect

of 1920

(3) Persons exempted under this section of exempted [New ] from the operation of any of the provisions of the Indian Succession Act, 1865, under section 332 of that Act are in that Act referred to as "exempted persons"

This section is based on section 332 of the Indian Succession Act 1865 (X of 1865) but in the consolidated Bill it is necessary to confire its operations to those provisions which are derived from that Act. The use of the term exempted persons is a drafting device which enables the language of the Bill to be shortened. -Notes on Clauses Sub section (3) is new

Exempted persons -The following persons have been exempted from the operation of the Indian Succession Act 1865 -

(1) Native Christians in the Province of Coorg. See Gazette of India 1868. p 1094

(2) The Jews of Aden See Gazette of India 1886 p 707

(3) The members of the races rnown as Khasias and Jyentengs in the Khasia and Jaintia Hills in Assam See Gazette of India 1877 p 512

(4) Mundas Oraons in the Province of Bihar and Orissa eee 1 PLJ 225 (226)

Where after the decision of a case relating to succession of certain lands belonging to an Oraon and during the pendency of the appeal a Notification was issued exempting the Oraons from the operation of the Indian Succession Act held that the decision would be unaffected by the Notification and the appeal must be decided with reference to the law contained in the Indian Succession Act-Turi Oraon v Leda Oraon 1 PLJ 225 (227) 20 CWN 1082 36 IC 206

#### PART II

## Or DOMICITE

Section 331 Act X of 1865

- 4 This Part shall not apply if the deceased was a Hindu, Muhammadan, Buddhist, Sikh Application of part or Iama
- The words Sikh or Jama are new and have been added for the following reasons. It is well settled that the word. Hindu in section 331 of the Indian Succes ion Act 1865 and in section 20 of the Probate and Adminis tration Act 1881 includes Jamas and Sikhs (Cf ILR 31 Cal 11 etc.) and as the Hindu Wills Act 1870 which the Bill consolidates makes special mention or Sikhs and Jamas they are separately mentioned throughout the Bill This and other similar sections may ne d to be qualified if and when the Special Marriage (Amendment) Bill which has just been passed by the Indian Legis lature becomes law -Notes on Clauses
- 9A Right of adopted child to inherit -According to the rules of succession laid down under the Succession Act an adopted child is not an heir entitled upon an intestacy to inherit the estate of his deceased adoptive parent A Buddhist woman adopted a girl as a daughter in Keittima form with a view to inherit; but she subsequently became a Christian and died as a Christian intestate Held that the adopted girl could not inherit-Ma Khin Than v Ma Ahma 12 Rang 184 AIR 1934 Rang 72 149 IC 1148

Section 5 Act X of 1835

Law regarding success sion to deceased person s immoveable and move able property respec

(1) Succession to the immoveable property in British India of a person deceased shall be regulated by the law of British India, wherever such person may have had his domicile at the time of his death -

(2) Succession to the moveable property of a person deceased is regulated by the law of the country in which such person had his domicile at the time of his death

#### Illustrations

(1) A having his domicile in British India dies in France leaving moveable property in France moveable property in England and property both moveable and immoveable and immoveable in British India. The succession to the whole is regulated by the law of British India.

(11) A an Englishman having his domicile in France dies 11 British India and leaves property both moveable and immoveable in British India and leaves property both moveable and immoveable in British India The succession to the moveable property is regulated by the rules which govern in I rance the succession to the moveable property of an Englishman dying domicaled in France and the succession to the immoveable property is regulated by the law of British India

10 Principle and scope of section —The principle of private Inter national Law is that all rights over immoveable properties are governed by the law of the country where the properties are situated-Bonnaud v Emile Charnol 32 Cal 631 (640)

This section applies to intestate as well as to testamentary succession so that if a person of foreign domicile dies having made a will respecting immove able properties situated in British India the British Indian Court will have jurisdiction to grant probate in respect of that will see Bhaurao v Lakhsmibai 20 Bom 607 (609) In England also it has been the practice of the Courts of probate to grant probate of foreign wills whether executed abroad or not if the testator has left personal property in England see In the goods of De Pradel LR 1 P & D 454 In the goods of Donna Maria 1 Hagg 498 In the goods of De La Saussaye LR 3 P & D 42 Not only succession to immoveable property but the execution attestation and interpretation of wills disposing of such property and all questions relating to it are also govern d by the law of the locality where that property is situate-Brodie v Barry 2 V & B 131, Sudd v Cook LR 8 App Cas. 577 As regards moveable property since it takes its legal character from the domicile of its owner succession to it as well as wills affecting it are regulated by the law of the domicile of the owner and not by the law of the country where that property may be found-Preston v Meltille 8 Cl & Fin 1: Arnold v Arnold 2 Myl & Cr 256 Moveables are in contemplation of law always upposed to be situate in the country where the owner has his or her domicile. The situs of moveable is the domicile of the owner-Miller v Administrator General 1 Cal 412 (418)

This section applies to the property of a private individual and not to the Property of a State II a foreign of feudatory State holds land in British India succession to such property follows the law of that State and is not governed by the law of succe sion in British India—Hajon N Bur Sing 11 Cal 17 (24 25) See also Samarendra v Birendra 35 Cal 777 (SB)

Parsi resident in Baroda dying having immoveable property in British India—Succession to such property—The question of status of parties is of course one to be decided according to the law of domicile of the parties but succession to immoveable property in British India of a person deceased is as provided by sec 5 of the Succession Act regulated by law of British India wherever such person may have had his domicile at the time of he death—Ratanishaw v Bamanji 40 BomLR 141 AIR 1938 Bom 238 175 IC 200

11 Onus of proof —The onus is on the persons who attack a settle ment (of moveable property) on the ground of nationality to show and show conclusively that the nationality of the settlor was foreign and if they succeed in doing so the onus is then on the persons supporting the settlement to show that the settlor had acquired a domicile in British India and that his estate should be administered according to the law prevalent in British Irdia—Bonnaud v Emile Charlos 32 Cal 633 (638)

One demicile only affects succession to moveable

6 A person can have only one Section 6 domicile for the purpose of the succession to his moveable property

12 One domicale —Though a man may have two dorincles for some purposes he can have only one domical, for the purpose of succession—Somer ville v Somerville 5 Ves 750 (786) Forbes v Forbes hay 341 Crookenden v Fuller 1 Sw & Tr 441 Thus a person not under an obligation of duty to live in the capital in a permanent manner as a nobleman or gentleman raving a mansion house (his residence) in the country and resorting to the

rretropolis for any particular purpose or for the general purpose of residing in the metropolis shall be considered domiciled in the country; on the other hand a merchant whose business lies in the metropolis shall be considered as having bis domicile there and not at lus country residence—Somerville v Somerville 5 Ves 750 (789)

Section 7 Act X of 1865 7 The domicile of origin of every person of legitimate Domicile of origin of birth is in the country in which at the person of legitimate time of his birth his father was domiciled, or, if he is a postfumous child, in the country in which his father was domiciled at the tine of the father's death

#### Illustration

At the time of the birth of A his father was domiciled in England. As domicile of origin is in England whatever may be the country in which he was

13 Domicile of origin —Every individual has at his birth become the subject of some particular country by the tie of national allegance which fixes his political status and becomes subject to the law of the domicile which determines his civil status —It is a settled principle that no man shall be without a domicile and to secure this end the law attributes to every individual as soon as he is born the domicile of the father if the child be legitimate or the domicile of the mother if the child be illegitimate. This is called the domicile origin and is voluntary. It is the creation of law not of the party—per Lord Westbury in Udny v Udny LR 1 Sc. App. 441

By the expression domicile of origin is not meant the domicile of birth for the mere accident of birth in any particular place cannot in any degree affect the domicile if the son of an Englishman is born upon a journey in foreign parts his domicile would follow that of his father. The domicile of origin is that arising from a man birth and connexions—Someritle 'Someritle 'Someritle

Section 8 Act X of 1865

8 The domicile of origin of an illegitimate child is in the country in which, at the time of his birth, his mother was domiciled

13A The domicile of origin of an illegitimate child is that of its mother

—Dalhousie v MacDonall 7 Cl & Fin 817 Urquhurt v Butterfield 37 Ch D

357

Section 9 Act X of 1865 Continuance of domicile of origin prevails of origin prevails until a new domicile has been acquired

14 Continuance of domicile of origin —The domicile of origin is to prevail until the party has not only acquired another but has manifested

and carried into execution an intention of abandoning his former domicile and taking another as his sole domicile-Somerville v Somerville 5 Ves 750 (787) Every man's domicile of origin must be presumed to continue until he has acquired another sole domicile by actual residence with the intention of aban doning his domicile of origin-per Lord Wensleydale in Askman v Askman 3 Macq 877 A change of domicile must be a residence sine arimo revertends remporary residence for purposes of health travel or business does not change the domicile Also every presumption is to be made in favour of the original domicile. No change can occur without actual residence in a new place. No new domicile can be obtained without a clear intention of abandoning the old-Lauderdale Peerage Case 10 App Cas 692 The domicile of origin once ascer tained in law clings and adheres to the person until he chooses o divest himself of it by substituting a domicile of choice for the domicile of origin law leans very strongly in favour of the retention of the domicile of origin It is thought that a man does not lightly give up his domicile of origin and substitute for it a domicile of choice. That being so in every cree where there are no declarations of intention either way Courts would be slow to infer from the mere fact of residence however protracted that residence may be the intention requisite to complete the substitution of the domicile of choice for that of The onus being upon the person alleging that a man has acquired a domicile of choice he must prove to the Court that that man had that intention -Santos v Pinto 41 Bom, 687 (697 706 707) 36 IC 227

10 A man acquires a new domicile by taking up his Section 10 Acquisition of new fixed habitation in a country which is 1865 domucile not that of his domicile of origin

Explanation -A man is not to be deemed to have taken up his fixed habitation in British India merely by reason of his residing there in His Majesty's civil, military or air force service, of in the exercise of any profession or calling

#### Mustrations

(1) A whose domicile of origin is in England proceeds to British India where he settles as a barrister or a merchant intending to reside there during the

remainder of his life. His domicile is now in British India

(11) A who e domicile is in England goes to Austria and enters the Austrian service intending to remain in that service. A has acquired a domicile in Austria

(iii) A who e domicile of origin is in France comes to reside in British India under an engagement with the Covernment of India for a certain number

of years. It is his intention to return to France at the end of that period. He does not acquire a domicile in British India.

(ii) A whose domicile is in England goes to reside in British India for the purpose of winding up the affairs of a partnership which has be en dissolved and with the intention of returning to England as soon as that purpose is accomplished He does not by such residence acquire a domicile in British India however long the residence may last

(1) A having gone to reside in British India in the circumstances mentioned

(i) A having gone to reside in British India in the circumstances mentioned in the last preceding illustration afterwards afters his intention and takes up his fixed habitation in British India A has acquired a domicile in British India (i) A whose domicile is in the French Settlement of Chandernagore is compelled by political events to take refuge in Calcutta and resides in Calcutta for many years in the hope of such political changes as may enable him to return vith safety to Chandernagore He does not by such residence acquire a domicile in British India

(1n) A having come to Calcutta in the circumstances stated in the last preceding illustration continues to reside there after such political changes have occurred as would enable him to return with safety to Chandernagore and he intends that his residence in Calcutta shall be permanent. A has, acquired a dorucile in British India.

Domicile of choice -A domicile of choice has been defined by Lord Halsbury in Winams v. Attorney General [1904] AC 287 as a permanent home that is to say a man who takes up his residence in a place other than that of his domicile of origin males it his domicile of choice if he intends that it should be his permanent home. In sec. 10 of the Indian Succession Act also t is said that a man acquires a new domicile by taking up his fixed habita tion in a country which is not that of his domicile of origin. Here the term fixed is not quite so definite as the word permanent but it ce tainly has the same meaning in this context, and it is of the essence of the domicile of choice that the residence should be intended to be permanent, that I to say a man making his choice should mean it to be final and definitely intend quaterus in allo exuere patriam that is to end his life in the residence which he had thus chosen in a new place or country-Santos v Pinto 41 Bom 687 (703) 36 IC The domicile of choice is acquired by a combination of fact vith inten-The fact is residence and the intention is that the residence should be permanent. That is to say the intention must be to male the domicile of choice in fact a residence and in intention a permanent residence-Santos v Pinto 41 Bom 687 (697 698) A domicile of origin cannot be lost by mere abandonment. It is not to be defeated animo merely but animo et facto and necessarily remains until a subsequent domicile be acquired. The acquisition of a domicile does not simply d pend upon the residence of the party the fact of residence must be accompanied by an intention of permanently residing in the new domicile and of abandoning the former-De Bonneral D Bonneral 1 Curt 857 (863 864)

A Native Christian was born in Goa of parents domiciled in Goa in Portuguese territory. In 1858 at the age of fourteen he came out to Bombay and lived there immiterruptedly, with the exception of brief visits to Coa till his death in June 1915 when he was 71 years old. During the whole of his reature life in Bombay he carried on a flourishing coach building busines p oviding himself with a house near his factory. From his conduct and declarations from time to time it appeared that he had eitled in Bombay meaning it to be his fixed habitation. Held that at any time between 1865 when he had attained majority and 1915 the deceased had acquired a domicile of choice 11 Bombay in substitution for the domicile of his origin in Goa and that the succession to the invocable property of the deceased was to be governed by the Indian Succession Act and not by the law of Portugal—Santos v. Pinto 41 Bom 687 (716 718) 36 IC 227

15A Condutions of change of domicale —To effect a change of domicale there must be an intention to settle in a new country as a permanent home and if this intention exists and is sufficiently carried into effect certain legal consequences follow from it whether such consequences were intended or not ard perhaps even though the person in question may have intended the exact cruntry. The real esen e of an assumption of a domicale of choice is intended. Where an Englishmru comes out to India with the object of doing missionary work in India for the period of his life and founds a mission who e members evote themselves to work in India throughout their hes which is undoubtedly 11° own intention and further spends the greater part of his life in India it rut to be held that he has thos n an Indian domicale and that he is governed by

the provisions of the Indian Succession Act—Thomas Edmund Teignmouth v Hugh Cares 62 Cal 869

Burden of Proof —The question of domicile should not be confused and nationality. The question whether a person abandons his domicile of origin and acquires a new domicile largely depends on residence coupled with an intention on his part to choose the new country where he resides as his permanent home in preference to the country of his birth. The onus of proving an aban dominent of the domicile of origin and acquisition of a new one is on the person who sets up such a change of domicile—Thomas Edmund Teignmouth v. Hugh Carry 62 Call 8:90

"Explanation" —Where a per on has to reside in another country for the performance of a public duly as Judge Consul etc it does not thereby change the domicile of the person so residing—Atternety General's Rose 1 H & C. 31

Special mode of action in the land of the

making such declaration

Domacle not sequenced one country to be its ambalaciet, constants of setton 12, Domacle not sequenced one country to be its ambalaciet, constants of foreign Government or as part of his family read on the latter country by read of residing there in pursuance of his appointment, and does not acquire a country of residing with such first-mentioned person at cart of his

residing with such inst-mentioned person at fact of his family, or as a servant

13 A new domicile continues and the former domin- Search

Continuance of new cile has been and remained has 175 de domicile.

having been abundomed and a new decime at the level of the property of the pro

The domicile of choice can be discarded as easily as it can be acquired by fact and an intention namely the fact of abandoning the residence accompanied by the intention that the abandonment shall be final and upon any such mere abandonment of one domicile of choice without the acquisition of another the domicile of origin revives brobno assore and without the need of any further act or intention on the part of the person. A person may abandon his domicile of origin and acquire a domicile of choice ab olutely good in the eve of the law and retain that domicile of choice as long as he pleases and may then again change his mind and determine either to substitute another comicile of choice for that which he means to abandon or to resume his domicile Tust as domicile of choice is easy to acquire so it is easy to abandon But for its abandonment two things are necessary the abandonment in fact, and the intention that that abandonment shall be final and permanent A man having acquired a domicile by choice may after many years turn home sick and decide to abandon his domicile of choice and again accept his domicile of origin. But if with the intention clear in his mind he should fail actually to abandon his domicile of choice and die before thus far giving effect to his intention the result would be that the domicile of choice would persist and the distribution of his estate would have to be governed by it-Santos v. Pinto 41 Bom 687 (697 700) Thus where a person born in Goa (in Fortuguese terr) tory) came to Bombay at the age of 14 and lived there up to his 71st year when he died and during the v hole of his life in Bombay he carrier on a flourish ing business and built a house but it appeared that shortly before his death he had formed an intention of returning to Goa and end his days there, but this intention was not carried into effect it was held that in spite of the intention of the deceased to return to the domicile of his origin, the domicile of choice continued to exist at the time of his death as the intention was not accompanied by the actual abandonment of the domicile of choice-Ibid (at p. 717)

16A Resumption of domicile —The section does not say how a domicile may be resumed. So long as both readence and intention to reside are not given up a domicile of choice is said to be retained. The abandonment of one domicile of choice may coincide with the acquisition of another or a person may at the same time resume his domicile of origin. In case where a domicile is clanged the domicile of origin in case where a domicile is clanged the domicile of choice but it review when there is no other domicile—Aing v. Foxuell. 3 ChD. 518. Doucett v. Goeghegan. 9 ChD. 441. Cocktell. V. Cocktell. 25 L.J. Ch. 732. In Lord v. Colum. 4 Drew. 422. Kindersley v. Cocktell. 25 L.J. Ch. 732. In Lord v. Colum. 4 Drew. 422. Kindersley v. Cocktell. 25 L.J. Ch. 732. In Lord v. Colum. 4 Drew. 422. Kindersley vighter evidence is required to warrant the conclusion that a man intends to abandon an acquired domicile and to resume his domicile of forigin than 13 necessary to justify the conclusion that he means to abandon his domicile of origin and a conclusion of contraining the conclusion of the means to abandon his domicile of original pages.

Section 14 Act \ of 1865 14 The domicile of a minor follows the domicile of the parent from whom he derived his domicile of origin

Lyplanation —The domicile of a minor does not change a thin that of his parent, if the minor is married or holds any office or employment in the service of His Majesty, or has set up, with the consent of the parent, in any distinct business

- Minor's domicile -The Indian law as to the domicile of the minor differs from the English law in this respect that in England after the death of the father children remaining under the care of the mother follow the domicile which she may acquire and do not retain that which their father had pt his death until they are capable of gaining one by acts of their own-Polinger v Wightman 3 Mer 67 Johnstone v Beattie 10 Cl & Fin 66 but in India they follow the domicile of their deceased father
- 15 By marriage a woman acquires the domicile of he Section 15 Act X of 1865 cile before woman on marriage

- 18 Wife's domicile -By marriage the domicile of the husband becomes that of the wife and she retains it after the death of her husband See Philimore on the Law of Domicile Ch VI No XLI et sea
- 18A Migration does not change character of estate -In the case of Mailaths Anns v Subbaraya Mudaliar 24 Mad 650 it was he'd that migration by the widow of a Hindu subject of French India to British India and acquisition of a British Indian domicile did not change character of the estate held by the vidow and if she did not adopt the system of law prevalent among Hindus \* in British India the property inherited by her from her husband would be held by her according to the customary law of French India
- 16 A wife's domicile during her Section 16 marriage follows the domicile of her Act X of Wife's domicile during marriage husband

Exception -The wife's domicile no longer follows that of her husband if they are separated by the sertence of a competent Court, or if the husband is undergoing a sentence of transportation

- 19 A married woman even though living apart from her husband has ro power to change her domicile-Re Daly's Settlement 25 Beav 456 In the absence of a decree of judicial separation or divorce a wife cannot obtain a eparate domicile from that of her husband-Re Macken.te (1911) 1 Ch 578 Fven after divorce until she exercises her option of acquiring a new domicile rer marital domicile is not changed-Warrender v Warrender 2 Cl & Fin 488
- 17 Save as hereinbefore otherwise provided in this Section 17 Minors acquisition of Part, a person cannot, during minority, ActX of new domicile acquire a new domicile
- 20 The principle is that a new domicile cannot be acquired by a party s own act during pupilage nor until the party is sus juris-Somerville v Somerville 5 Ves 787 (per Lord Alvanley) Forbes v Forbes Kay 341

Upon attainment of majority the faculty of acquiring the domicile of choice obtains but until the new domicile of choice is acquired the demicile of origin subsists-Collier v Rita (1841) 2 Curt 855

An insane person cannot acquire a new domicile Section 18 in any other way than by his domicile Act X of following the domicile of another Lunatic acquisition of new domicile person

21 The domicile of an insane person follows the domicile of his father—Sharpe v Crispin LR 1 P & D 611 The expression another person in this section means the person having the care and custody of the functic.

Section 19 Act X of 1865

Succession to move able property in British India in "bsence of proof of domicile elsewhere

If a person dies leaving moveable property in British India, in the absence of proof of any domicile elsewhere, succession to the property is regulated by the law of British India

See 32 Cal 631 cited in Sec 5 under heading Onus of proof

## PART III

### MARRIAGE

Section 4 Act X of 1865 20 (1) No person shall, by marriage, acquire any inInterests and powers terest in the property of the person
whom he or she marries or become incapable of doing any act in respect of
his or her own property which he or she could have done if

Section 331 Act X of 1865 (2) This section-

(a) shall not apply to any marriage contracted before the first day of January, 1866,

Section 2 Mar Worn Prop Act III of 1874 (b) shall not apply, and shall be deemed never to have applied, to any marriage one or both of the parties to which professed at the time of the marriage the Hindu, Muhammadan, Buddhist, Sikh or Jama religion

22 Scope —This section does not apply to the moreable property (cituated in India) of persons not having an Indian domicile because the move ables are in contemplation of law supposed to be situated in the country where the owner has his domicile. Thus where both the husband and wife were of Fnglish domicile and they martred during their sojourn in India and the question was whether after the death of the wife without leaving lireal descendants the husband was entitled to her moveable property. Held that the question was to be decided with reference to English law and not under the Irdian Succession Act and according to the English law the hisband was so entitled—Miller V. Administrator General I. Cal 412 (420). But if the property is immoveable, and situated in India the Indian Succession Act applies even though the husband and write have no Indian domicile—Miller See Section 5.

S note the wife has absolute control over her own property and the husband closs not acquire any interest in it by marrage the Court in India will not in a suit for judicial separation order the husband to give security for the wife s costs except under special circumstances—Proby is Proby 5 Cal 357 (362) But the

case would be otherwise when the wife has no property of her own And there fore a wife without property of her own seeking a divorce is entitled to have provision made by her hu band for the payment of her costs in the suit—Natall v Natall 9 Mad 12 (14) Bojle v Bojle 30 Cal 631 (634)

21 If a person whose domicile is not in British India Section 44

Fact of myrans marries in British India a person whose Act V of
1865

Effect of marriage between person domiciled and one not domiciled in British India marries in British India a person whose domicile is in British India, neither party acquires by the marriage any rights in respect of any property

of the other party not comprised in a settlement made previous to the marriage, which he or she would not acquire thereby if both were domiciled in British India at the time of the marriage

23 Pror to the passing of this Act the preponderance of authority had been in favour of making the domicile of the husband or at lenst that of the marriage govern the rights of the parties where the domiciles of the husband and wife were different. The Succession Act where either of the parties has an Indian domicile very reasonably submits all their rights both as to moveables and immoveables to the territorial law of India—Miller v. Admin strator General, 1 Cal. 412 (420, 421).

This section deals with rights arising upon marriage and should not be read so as to include or be applicable to rights of succession because rights of success on to a person sestate do not arise upon the marriage but upon the death of that person. Therefore where a man having an English domicile mirried an Indian Christian woman possessing both moveable and immoveable properties in India and the question arose whether after the death of the wife the husband would be entitled to the moveable property left by her it was held that see 44 had no application to the case but that the case must be decided vith reference to ec 5 (which says that succession to the roweable property of a deceased person is regulated by the law of the country of his domicile) and see, 15 (which says that the wife acquires the domicile of her husband) and the combined effect of these two sections is that the succession would be decided with reference to the English law and the husband was entitled to inherit the whole of the wifes moveable property to the exclusion of her next of him—Hill v Administrator General 23 Cal 506 (511 512)

22 (1) The property of a minor may be settled in Section 45
Settlement of minors property in contemplation of marriage, provided Act X of the settlement is made by the minor the settlement is made by the minor with the approbation of the minor's father, or, if the father is dead or absent from British India, with the approportion of the High Court

(2) Nothing in this section or in section 21 shall apply Section 331 to any will made or intestacy occurring before the first day Act X of of January, 1886, or to intestate or testamentary succession to the property of any Hindu, Muhummadan, Buddhist, Sikh or Janua

# PART IV

# OF CONSANGUINITY

Section 331 Act X of 1865 Section 8 Act X XI of 1865 Application of Part or intestacy occurring before the first day of January, 1866, or to intestate or testamentary succession to the property of any Hindu, Muhammadan, Buddhist, 5th. Jaina or Parsi

Section 20 Act X of 1865

- 24 Kindred or consanguinty is the connection or relakindred or consanguinty tion of persons descended from the same stock or common ancestor
- 24 Consanguinity —Consanguinity or kindred is defined to be im cultim personarum ab codem stipite descendentium is the connection or relation of persons descended from the same stock or common ancestor. Black Comm 203 cited in Wilsiams on Executors 11th Edn. Vol. I. p. 330

Kindred —The definition of kindred given in this section does not apply to Hindres because it is limited to blood relations and excludes those who are related by marriage whereas the word kindred when applied to Hindres includes plations by marriage (eg sons wife)—Dines Chandra v Biraj Kamini 15 CWN 945 (950) 11 IC 67

Section 21 Act X of 1855 25 (1) Lineal consanguinity is that which subsists between two persons, one of whom is descended in a direct line from the other, as between a man and his father, grandfather and great-grandfather, and so upwards in the direct ascending line, or between a man and his son, grandson, great-grandson and so downwards in the direct descending line.

(2) Every generation constitutes a degree, either as

conding or descending

(3) A person's father is related to him in the first degree, and so likewise is his son, his grandfather and grandson in the second degree, his great-grandfather and great-grandson in the third degree, and so on

The definition in this section is taken from 2 Black Comm 203 cited in

Williams on Executors 11th Edn Vol I p 330

Lincal con anguinity comes strictly within the definition of Linculum personarum ab eadem stipite descendentium since relations are uch as descend from one another and both of course from the same common ancestor—Smith v. Massey. 30 Born. 203

Section 22 Act X of 1855 26 (1) Collateral consunguinty is that which subcollateral con angunuty sists between two persons who are descended from the same stock or ancestor, but neither of whom is descended in a direct line from the other

(2) For the purpose of ascertaining in what degree of lindred my collateral relative stands to a person deceased, it is necessary to red to the common stock and then downwards to the collateral relative, a degree being allowed for each person, both ascending and descending

25 Collateral relations - Collateral relations agree with the lineal in this that they descend from the same stock or ancestor but differing in this that they do not descend one from the other Collateral I insmen are such then as literally spring from one and the same ancestor tho is the stirbs or root the states trunk or common stock from whence these relations are brenched out The mode of calculating the degrees in the collateral line for the purpose of ascertaining who are the next of kin so as to be entitled to administration con forms to that of the civil law and is as follows to count upwards from either of the parties related to the common stock and then downwards again to the other reckoning a degree for each person both ascending and descending or in o her words to take the sum of the degrees in both lines to the common ancestor .....2 Black Comm 204 (207) ested in Williams on Executors (11th Edn.) Vol. 1 r 331

Illegiting the children -This Act contemplates only those relations which the law recognises a c relations flowing from lawful wedlock. It does not contemplate illegitimate children. Therefore the son of one of two illegitimate daughters of the same parents will not be deemed a nephew of the other-Smith v Massey 20 Born 500

Persons held for pur pose of succession to be similarly related to deceased

Sec-28.1

27 For the purpose of succession, Section 23 there is no distinction-

Act X of

(a) between those who are related to a person deceased through his father, and those who are related to him through his mother, or

(b) between those who are related to a nerson deceased by the full blood, and those who are related to him by the half blood, or

(c) between those who were actually born in the lifetime of a person deceased and those who at the date of his death were only conceived in the womb, but who have been subsequently born alive

Degrees of kindred are computed in the manner Section 24 Mode of computing of set forth in the table of kindred set out Act X of degrees of kindred ın Schedule I

#### Illustrations

(1) The person whose relatives are to be recloned and his cousin german or first cousin are as shown in the table related in the fourth degree there being one degree of ascent to the father and another to the common ancestor

the grand father and from him one of descent to the uncle and another to the cousin german making in all four degrees.

(n) A grandson of the brother and a son of the uncle ie a great nephew and a cousin german are in equal degree being each four degrees removed (iii) A grand son of a cousin german is in the same degree as the grandson of a great uncle for they are both in the sixth degree of kindred

## PART V

# INTESTATE SUCCESSION

## Preliminary

Section 331 Act X of 1865 29 (1) This Part shall not apply to any intestacy occurring before the first day of January 1866 or to the property of any Flindu, Muhammadan, Buddhist, Sikh or Jama

Section 2 Act X of 1865 Section 8 Act XXI of 1865

- (2) Save as provided in sub-section (1) or by any other law for the time being in force the provisions of this Part shall constitute the law of British India in all cases of intestacy
- 26 Scope of section —Although this section exempts the property of Hindus from the operation of this Act there is no prohibition to a Hindu succeed ing under it to the property of a Christian—Administrator General v Annada chan 9 Mad 466 (471) Thus a Hindu father can succeed to his Christian son (who was originally a Hindu but afterwards adopted Christianity)—Ibid Hindu brothers and sisters can succeed to the property of their deceased brother who had become a Christian—Nepenbala v Suirbanta 15 CWN 158 (159) 8 IC 41

For the purposes of this section a Hindu (or Muhammadan or Buddhat) remains a per on who remains a Hindu (or Muhammadan or Buddhat) at the time of his death. It is not sufficient that he is of Hindu hith and origin So if a Hindu embraces Christianity and continues to be a Christian up to the time of his death. he is not a Hindu within the meaning of this section and all questions of succession to his estate upon intestacy are to be determined by this Part of the Act—Nepenbala v Sutkanta 15 C WN 158 (161) Kamatai v Digbyat 43 All 526 (533) (PC) See also Pomissam v Dorasami 2 Mid 209 (211) Administrator General v Anandachari 9 Mad 466 (471) Tells v Soldanha 10 Mad 69 Dagree v Pacott 19 Bom 783 (789) Converts from Hinduism to Christianity are governed by the rules of inheritance in the Indian Succession Act and evidence cannot be admitted to show that they have as a class retained the Hindu Law rules of inheritance-Dagree v Pacotti supra

Brahmo — A person becoming a Brahmo does not necessarily cease to be a Hindu that is to say omething more than mere becoming a Brahmo is necessary for a man to cut himself off from Hinduism. A declaration under the 2nd Schedule of Act III of 1872 (Special Marinage Act) is seffective only for the purpose of that Act and does not involve a renunciation of the Hindu faith—In re Jinatendal Nath Roy. 49 Cal. 1069—25 CWN. 799—AIR. 1923. Cal. 265—70. I.C. 463. Vija.g., auniv. Vairandals. 30. Bom L.R. 139—108. I.C. 452. AIR. 1928. Bom. 74.

(77) It should be noted that under the Special Marriage Act as amended in 1923 a Brahmo may make a declaration professing the Hindu religion.

Migrated Hindu —If a Hindu migrates to Burma and marries a Burmese woman that in itself may not necessarily deprive him of his Hindu status in the eye of the law But if he has descendants who have been born and have always lived in Burma and who have inter married within its people then even though they may form a community of their own which inherits many traces of Hindu usages still if their u.age and religion are of a character widely different from Hinduism the community cannot be regarded as Hindu. The people in Burma known as Kalars who are descendants from Hindus who had married Burmese women are not Hindus within sec 13 of the Burma Laws Act or sec. 331 of the Indian Succession Act 1865 Consequently succession to the estate of a deceased Kale is governed by the provisions of the Indian Succession Act and not by the Hindu or Buddhist Law—Ma Yait v Maung Chit 49 Cal 310 (324) (PC) 1 Bur LJ 15 AIR 1822 PC 197 66 1 C 609

Chinese Buddhist —A Chinese Buddhist is not strictly speaking a Buddhist within the meaning of the exception contained in sec 29 because a Chinese whether in China or in India and Burma is ordinarily a Confucian and this Confucianism is tinged sometimes with Buddhism sometimes with Taoism, and often with one or more of the other religions of China Therefore succession to the property of a Chinese Buddhist domiciled in Burma is governed by the Indian Succession Act—Phan Tiyak v Lim Kyin 8 Rang 57 (FB) 124 I C 849 A IR 1800 Rang 81 (105)

Jews —Jews are governed by the Indian Succession Act—In re Sarah Ezra 58 Cal 761 AIR 1931 Cal 560 (562) 134 IC 443

Christian —If a Christian abdicates his religion by a clear act of renucation and adopts Hinduism by undergoing formal convertion and gives up his Christian name and marries a Hindu according to Hindu rites, he must be considered as a Hindu—Rationsi v Administrator General 52 Mad 160 AIR 1928 Med. 1279 (1283) 111 IC 364

If a family of Hindus after becoming Christians continue to remain in coparcenership this fact will not entitle them to be governed by the Hindu law of survivorship but succession to their property will be governed by the Indian Succession Act. Thus where two Hindu brothers A and J became Christians but were living in coparcenary and then A died it was held that J could not take the whole property by survivorship. The effect of the Succession Act is to convert the coparcenary rights into individual rights and to subject such rights in cases of intestacy to the rules of succession provided by this Act—Tellis v Saldanha 10 Mad 69 (72). The Bombay High Court however expressed the view that the rules of succession contained in this Act would not interfere with the rights of coparcenership and survivorship prevalent in a Christian family converted from the Hindu religion—Francis v Gabri Ghosal 31 Bom. 25 (31 x-2) dissenting from 10 Mad 69.

Even if it is alleged that the deceased (a Hindu convert to Christianity) had by his acts made an indication that his succession was no' to be governed by the Indian Succession Act the Court will not accept any evidence on this point. The plain question is was the deceased a Hindu or a Christian? If he was a Christian the Succession Act rules would apply It is not for the Court to enter upon an examination of his conduct so as to prevent the Indian Succession Act retting its full and proper application. Were the Court to do so a situation

of confusion would be produced the plain law of the Succession Act would be exiscerated and in each case inquiry might have to be entered upon as to whether a deceased subject of the Crown wished or by his acts compelled that the law of the land should not apply to his case-Kamawati v Digbijai 43 All 525 (533 534) (PC) AIR 1922 PC 14 64 IC 559

Armenians - The Indian Succession Act is applicable to Armenians-4-atoon v Johannes Morton 19

Custom if overrules provisions of the statute -No custom shall be allowed to overrule the provisions of this statute. Where a case is clearly governed by the Indian Succession Act the Courts are bound to give effect to the rules of succession contained in this Act and are not competent to accept custom (e.g. a custom excluding females) as a reason for deviating from the p ovisions of this Act since this Act contains no clause saving custom-Tuns Argon v Leda Orgon PLJ 225 (228) 36 IC 206

Sub section (2) -The provisions of sub section (2) show that the Att is of universal application in this country unless a person claiming to be excepted can show that he is specifically excepted from the operation of its provisions-Nepen Bala v Siti Kanta 15 CWN 158 (160) 8 IC 41

Section 23 Act X of 1865

A person is deemed to die intestate in respect of all property of which he has not made As to what property a testamentary disposition which is deceased considered to have died intestate capable of taking effect

#### Illustrations

(1) A has left no will He has died intestate in respect of the whole of his p operty (11) A has left a will whereby he has appointed B his executor but the will

contains no other provisions. A has died intestate in respect of the distribution

(iii) A has bequeathed his whole property for an illegal purpose. A has

died intestate in respect of the distribution of his property.

(iv) A has bequeathed 1000 rupees to B and 1000 rupees to the eldest son of C and has made no other bequest and has died feaving the sum of 2000 rupees and no other property. C died before A without having ever had a son. A has died intestate in respect of the distribution of 1000 rupees.

Intestate -A man is said to die intestate not on v where he has left no will but also where he has died leaving a will which is informally executed or is otherwise void and is thus incapable of taking effect as for instance where the sole legatee died during the lifetime of the testator-Erasha v Jerbas 4 Bom 537 Where a testator makes a will with respect to a part of his property which is situate in Canada but makes no will with respect to his properties situate in India he must be deemed to have died intestate in respect of the latter properties withing the meaning of this section and no person can be executor in respect the eof-Nathu Ram , Alliance Bank 30 PLR 326 AIR 1929 Lah 5:6 116 I C. 558

### CHAPTER II

RILLES IN CASES OF INTESTATES OTHER THAN PARCE

31 Nothing in this Chapter shall Section 8 Act XXI of Chapter not to apply to Pareie apply to Parsis

32 The property of an intestate devolves upon the Section 26 Devolution of such wife or husband, or upon those who are 1865 of the kindred of the deceased, in the order and according to the rules hereinafter contained in this Chapter

Explanation -A widow is not entitled to the provision hereby made for her if, by a valid contract made before her marriage, she has been excluded from her distributive share of her husband's estate

28 "Explanation" ... The rule in this Explanation is based on the English law The widows title under the Statute of Distributions may be barred by a settlement before marriage excluding her from her distributive hare of her lusband's personal estate and even in the case of a female infant she may be barred of her right by such a settlement made before marriage with the approba t on of her parents or guardians-Lord Buchinchamshire v Dru v 3 Bro PC

But it is otherwise when the husband by a will makes a provision for his wife stating it to be in heir of and in har of all her claims or his personal e tate and then subjects his personality to a disposition which larges or is void o that the latter fund is hable to distribution for then notwithstanding the ord of the will the widow is entitled to a hare under the statute-Pickering v Stamford 3 Ves 332 Garthshore v Challe 10 Ves 17 18 The principle of this distinction is that where a woman has before marriage agreed to accept a consideration for her widows share she bound by his contract whether her husband die testate or intestate but where there is no such contract but the provision in bar of the distributive share arises upon the husband's will it is presumed that the motive for the widow's exclusion originated in a particular design or purpose of the testator to for the benefit of the person in favour of whom the property was bequeathed by him so that if the rurpose be disappointed there is no reason why the bar of exclusion should continue-Williams on Executors (11th Edn.) Vol II p 1234 But this principle cronot be applied tr a case where on the face of the will there is an inte tacy with language excluding the widow in absolute and comprehensive terms from any further share -Lett v Randall 3 Sm & G 83

33 Where the intestate has left a widow—

tained.

(a) if he has also left any lineal descendants, onethird of his property shall belong to his widow and the remaining twothuds shall go to his lineal descendants according to the rules hereinafter con-

Where intestate has left widow and lineal descendants or widow and kindred only or widow and no kindred

Section 27

- (b) save as provided by section 33A, if he has left no lineal descendant, but has left persons who are of kindred to him, one-half of his property shall belong to his widow and the other half shall go to those who are of kindied to him, in the order and according to the rules herein after contained.
- (c) if he has left none who are of kindred to him, the whole of his property shall belong to his widow
- Lineal descendants -The phrase lineal descendants means descendants born in lawful wedlock and does not include descendants of a union which is not that of husband and wife eg the offspring of a polygamous mar riage which is void under the English law-Sophia Blin v Maria David 12 Bur I T 48 51 I C 542 (544)

A Hindu became a convert to Christianity and died leaving a widow a brother and a sister Held that as the deceased died a Christian succession to his estate would be governed by the Indian Succession Act and not by the Hindu law and under this section one half of the property will go to the vidow and the other half to the brother and sister in equal shares (even though they are Hindus)-Nepenbala v Sitikanta 15 CWN 158 (159) 8 IC 41 26 under sec 29

If a Hindu marries a Hindu girl and then embraces Christia lity whereupon the wife refuses to live with him and renounces all claims on his estate she is not entitled after her husband's death to her share as a widow to which but for the renunciation she would have been entitled under this section-Administrator General v Anandachars 9 Mad 466 (472)

INew 1

etra

(1) Where the intestate has left a widow but no lineal descendants, and the rett value of Special provision where his property does not exceed five thou intestate has left widow and no lineal descend

sand rupees, the whole of his property shall belong to the widow

- (2) Where the nett value of the property exceeds the sum of five thousand rupees, the widow shall be entitled to five thousand rupees thereof, and shall have a charge upon the whole of such property for such sum of five thousand rupees with interest thereon from the death of the intestate at 4 per cent per annum until payment
  - (3) The provision for the widow made by this section shall be in addition and without prejudice to her interest and share in the residue of the estate of such intestate remaining after payment of the said sum of five thousand rupees, with interest as aforesaid, and such residue shall be distributed

in accordance with the provisions of section 33 as if it were the whole of such intestate's property

- (4) The nett value of the property shall be ascertained by deducting from the gross value thereof all debts, and all funeral and administration expenses of the intestate, and all other lawful habilities and charges to which the proberty shall be subject
  - (5) This section shall not apply-

(a) to the property of -

(1) any Indian Christian

- (11) any child or grandchild of any male person who is or was at the time of his death an Indian Christian or
- (iii) any person professing the Hindu, Buddhist, Sikh or Jama religion the succession to whose property is, under section 24 of the Special Marriage Act 1872 (III of 1872), regulated by the provisions of this Act.
- (b) unless the deceased dies intestate in respect of all his property

This section has been added by the Indian Succession (Arrendment) Act 1926 (XL of 1926) in order to provide more liberally for the surviving widow where there are no lineal descendants in the case of a total intestacy. For Statement of Objects and Reasons see Gazette of India 1926 Part V p 114

Where the intestate has left no widow, his pro-Section 28 perty shall go to his lineal descendants Act X of or to those who are of kindred to him. Where intestate has left not being lineal descendants, according

no widow and where he has left no kindred

to the rules heremafter contained, and, if he has left none who are of kindred to him, it shall go to the Crown

A husband surviving his wife has the same rights Section 43 in respect of her property, if she dies Act X of intestate, as a widow has in respect of Rights of widower her husband's property if he dies intestate

30 Widower's rights ... The husband can only succeed to half of the property of his deceased wife in case she dies intestate leaving no lineal descen cant But in the ab ence of any next of kin the husband would be entitled to the whole of his wife's property as her heir-Ganta Daniyelu v Gunti Yesu AIR 1925 Mad. 1110 (1111) 87 IC 354

## Distribution where there are lineal descendants

Section 29 Act X of 1865

The rules for the distribution of the intestate's property (after deducting the widow's Rules of distribution share, if he has left a widow) amongst his lineal descendants shall be those contained in sections 37

Section 30 Act X of 1865

37 Where the intestate has left surviving him a child or children, but no more remote lineal Where intestate has descendant through a deceased child, left child or children only the property shall belong to his surviving child, if there is only one, or shall be equally divided among all his surviving children

Child -The word child does not include an illigitimate child Words defining relations in this Act refer to relations flowing from lawful wedlock -Sarah Ezra 58 Cal 761 A I R 1931 Cal 560 (562) 134 I C 443

Section 31 Act X of 1865

Where the intestate has not left surviving him any child, but has left a grandchild or Where intestate has grandchildren and no more remote left no child but grand child or grandchildren descendant through a deceased grand child, the property shall belong to his surviving grandchild if there is only one, or shall be equally divided among all his s irviving grandchildren

Illustration

(i) A has three children and no more John Mary and Henry They all the before the father John leaving two children Mary three and Henry four Afterwards A thes intestate leaving those nine grandchildren and no descendant of any deceased (randchild. Each of his grandchildren will have one minth (ii) But if Henry has died leaving no child then the whole is equally divided between the intestate's five grandchildren the children of John and Mary

Note -- Illustration (c) of this section has been transferred to sec 40 as

Illustration (iv) as it properly relates to the latter section

Section 32 Act A of 1865

In like manner the property shall go to the sur viving lineal descendants who are Where intestate has nearest in degree to the intestate, left only great grand children or remoter lineal where they are all in the degree of

, more remote degree

descendants.

40

great-grandchild to him, or are all in

Section 33 Act \ of 1865

Where intestate leaves lineal de cendants not all in same degree of kindred to him and those throah whom the more remote are desc nd ed are dead.

 If the intestate has left lineal descendants who do not all stand in the same degree of kindred to him, and the persons through whom the more remote are descended from him are dead, the property shall be divided into such a number of equal shares as may correspond with the

number of the lineal descendants of the intestate who either stood in the nearest degree of kindied to him at his decease. or, having been of the like degree of kindred to him, died before him, leaving lineal descendants who survived him

(2) One of such shares shall be allotted to each of the lineal descendants who stood in the nearest degree of kindred to the intestate at his decease, and one of such shares shall be allotted in respect of each of such deceased lineal descendants, and the share allotted in respect of each of such deceased lineal descendants shall belong to his suiviving child or children or more remote lineal descendants, as the case may be, such surviving child or children or more remote lineal descendants always taking the share which his or their parent or parents would have been entitled to respectively if such parent or parents had survived the intestate

#### Illustrations

(1) A had three children John Mary and Henry John died leaving four children and Mary died leaving one and Henry alone survived the father On the death of A intestate one-third is allotted to Henry one third to John s'our

use deam or a intestate one-third is allotted to Henry one third to John's four children and the remaining third to Mary's one child (ii) A left no child but left eight grandchildren and two children of a decased grandchild The property is dailotted into nine parts one of which is allotted to each grandchild and, the remaining one ninth is equally divided between the two great grandchildren

between the two great grandchildren

(m) A has three children John Mary and Henry John des leaving four
thildren and one of John's children dies leaving two children Mary dies leaving
one child A afterwards dies intestate. One-third of his property is allotted to
Henry one third to Mary's child and one third is divided into four parts one
of which is allotted to each of John's three surviving children and the remaining
part is equally divided between John's two grand children

(w) A has two children and no more John and Mary John dies before
his father leaving his wife pregnant. Then A dies leaving Mary surviving him
and in due time a child of John is bom. As property is to be equally divided
between Mary and the posthumous child

Note -Illustration (iv) of this section was formerly Illustration (c) under sec. 31 of the old Act but as it was not appropriate under that section it ba been transferred to the present section

# Distribution where there are no lineal descendants

Where an intestate has left no lineal descendants, Section 34 the rules for the distribution of his 1865

Rules of distribution where intestate has left no lineal descendants

property (after deducting the widow's share, if he has left a widow) shall be those contained in sections 42 to 48

42 If the intestate's father is living, Section 35 Act X of Where intestate s father living he shall succeed to the property 1865

Under this section a Hindu father can succeed to the property of his on who had become a convert to Christianity because the prohibition contained in sec 29 applies only to the property of a Hindu and there is nothing in this Act to prevent a Hindu from succeeding to the property of a Christian—Administrator General v. Anondochari 9 Mad 466 (471 472) See Notes under sec 29.

Section 3b Act X of 1865 43 If the intestate's father is dead, but the intestate's mother is living and there are also father dead but has brothers or sisters of the intestate brothers and living, and there is no child living of any deceased brother or sister, the property in equal shares

#### Illustration

A dies intestate survived by his mother and two brothers of the full blood John and Henry and a sister Mary who is the daughter of his mother but not of his father. The mother takes one-fourth each brother takes one-fourth and Mary the sister of half blood takes one-fourth.

Section 37 Act X of 1865 Where intestate's father is dead, but the intestate's mother is living, and if any brother or sister and the child or children of any deceased brother or sister living and if any brother or sister who may have died in the intestate's lifetime are also living, then the mother and each living brother or sister, and the living child or children of each deceased Liother or sister, shill be entitled to the property in equal shares, such children (if more than one) taking in equal shares only the shares which their respective parents would

## Illustration

have taken if living at the intestate's death

A the intestate leaves his mother his brothers John and Henry, and also one child of a deceased sister Mary and two children of George a deceased brother of the half blood who was the son of his father but not of his mother. The mother takes one fifth John and Henry each takes one fifth the child of Mary takes one fifth and the two children of George divide the remaining one-fifth contails between them.

Section 38 Act X of 1865 Where intestate's father is dead, but the intestate's father is dead and his mother and children of any deceased brother or sister living or children of each decensed brother or sister living or children of each decensed brother or sister shall be entitled to the property in equal shares, such children (in more than one) taking in equal shares only the shares which their respective parents would have taken if living at the intestate's death

#### Illustrations

A the intestate leaves no brother or sister but leaves his mother and one A the intestate leaves no brother or sister but leaves mis butler and one thild of a deceased sister Mary and two children of a deceased brother, George. The mother takes one third the child of Mary takes one third and the children of George divide the remaining one third equally between them

Where intestate s father dead but his mother living and no brother sister nephew Dr niece

46 If the intestate's father is dead, but the intestate's Section 39. mother is living, and there is neither Act X of brother, nor sister, nor child of any brother or sister of the intestate, the property shall belong to the mother

Where the intestate has left neither lineal descen- serior 40 47 dant, nor father, nor mother, the pro- Act X of

perty shall be divided equally between

Where intestate has left neither lineal descendant nor father nor mother

his brothers and sisters and the child or children of such of them as may have died before him, such children (if more than one) taking in

equal shares only the shares which their respective parents would have taken if living at the intestate's death

IV here the intestate has left neither lineal descen-Section 41 dant, nor parent, nor brother, nor Act X of Whe e intestate has

left neither lineal des cendant nor parent nor brother nor sister

sister, his property shall be divided equally among those of his relatives who are in the nearest degree of kindred to him

#### Illustrations

(i) A the intestate has left a grandfather and a grandmother and no other relative standing in the same or a nearer degree of kindred to him. They being in the second degree will be entitled to the property in equal shares exclusive of any uncle or aunt of the intestate uncles and aunts being only in the third degree (ii) A the intestate has left a great grandfather or a great grandmother, and uncles and aunts and no other relatives standing in the same or a nearer degree of kindred to him. All of these being in the third degree will take equal. Rhares

(m) A the intestate left a great grandfather an uncle and a nephew but no relative standing in a nearer degree of kindred to him. All of these being in the third degree ulit take equal shares

(iv) Ten children of one brother or sister of the intestate and one child of

another brother or sister of the intestate constitute the class of relatives of the nearest degree of kindred to him. They will each take one elevanth of the property

Note -The word Where has been substituted for If

Where a distributive share in the property of a Section 42 person who has died intestate is claimed Act X of Children s advance ments not brought into by a child, or any descendant of a child, of such person, no money or other pro-

perty which the intestate may, during his life, have paid.

given or settled to, or for the advancement of, the child by whom or by whose descendant the claim is made shall be taken into account in estimating such distributive share

Departure from English law -The rule in this section departs from the English law By sec 5 of the Statute of Distribution (22 & 23 Car II c 1 10) it is provided that no child of the intestate except his heir at law who snall have any estate in the land by the settlement of the intestate or who shall be advanced by the intestate in his lifetime by pecuniary portion equal to the distributive shares of the other children shall participate with them in the surplus, but if the estate o given to such child by way of advancement be not equivalent to their shares, then such part of the surplus as will make it so shall be allotted to him or her 2 Black Comm 516 The end and intent of this statute was to make the provisions for all the children of the intestate equal as near as could be estimated-Eduards v. Freeman 2 P. Wms 439 440

The reason for departing from the English law has been thus stated by the Law Commissioners We propose to omit the rule of English Lw by which in cases of total intestacy anything which a child may have received from the father in his lifetime by way of advancement is deducted from his share of the father a estate. This rule though founded upon a desire to equalise as far as possible the benefit derived by children from their father's property often fails to effect that object and proves productive of considerable inconveniences. It tends to encourage minute and difficult investigations of matters of family account and it frequently interferes with the arrangement of a father who has given property to a child by way of advancement and yet has not seen fit to make any alteration in his testamentary disposition and those evils which are often felt in England would be much more felt in India -Gazette of India 1st July 1864 p 53

### CHAPTER III

# SPECIAL RULES FOR PARSI INTESTATES

General

principles

relating to

intestate

succession

Old

Section 1 Parsi Intest Succ Act XI of

50 Where a Parsi dies leaving a widow Division of and children, the property among property widow and children of which he dies intestate intestate shall be divided among the widow and children, so that the share of each son shall be double the share of the widow, and that her share shall be double the share of each daughter

New

50 For nurpose of testate succession among Parsis-

(a) there is no distinction between those who were actually born in the lifetime of a person deceased and those who at the date of his death svere only conceived in the womb. but have been subse-

quently born alive,

New

- (b) a lineal descendant of an intestate who has died 111 the life-time of the without intestate leaving a widow or widower OΓ lmeal descendant shall not be taken into account determining the manner ın which the property which the intestate has died intestate shall be divided. and
- (c) where a widow of any relative of an intestate has married again in the life-time of the intestate, she shall not be entitled to receive any share of the property of which the intestate has died intestate. and she shall be deemed not to be existing at intestate's death

Under the Parsi Succession Act, widows and children come in before brothers and sisters-Erasha v Jerabat 4 Bom 537

Where a female Parsi dies leaving Division of property widower and among children. the widower and children of property ٥f intestate which she dies shall be divided intestate among the widower and such children, so that his share

51 Division of a male intestate s property among his widow children and parents. divided

(1) Subject to the Section 2 Act XXI of provisions of sub- 1865 section (2), the property which а male Parsı dies ıntestate shall

(a) where he dies

shall be double the share of each of the children

New

leaving a widow and shildren, among the widow and children, so that the share of each son and of the widow shall be double the share of each doughter or.

each daughter, or

(b) where he dies
leaving children but
no widow, among
the children, so that
the share of each
son shall be double
the share of each
daughter

(2) Where a male Parsi dies leaving one or both parents in addition to children or a widow and children, the property of which he dies intestate shall be divided so that the father shall receive a share equal to half the share of a son and the mother shall receive a share equal to half the share

of a daughter

34 Where a female Parsi dies intestate and possessed of estate real and
personal her whole estate on her death vests in her husband and children in
the shares defined by this section—Shapuri v Rustomi 5 Bom LR 252

Section 3 Act XXI of 1865

When a Parsi dies leaving children Division of property widow but no amongst the the property of children of male intesdies x hich he tate who intestate shall be leaves no widow divided amongst the children so that the share of each son shall be four times the share of each daughter

Division of a female intestate s property among her widower and children 5 Bom L R 252

52 The property of which a female Parsi dies intestate shall be divided—

(a) where she dies leaving a widower and children, among the widower and children so that the widower

New

after such distribution has been made shall be divided in accordance with the provisions of this Chapter as property of which the intestate has died intestate. and in making the division of such residue the said deceased son of the intestate shall not be taken into account

- (b) If such deceased child was a daugh ter, her share shall be divided equally among her children
- (c) If any child of such deceased child has also died during the life-time of the intestate, the share which he or she would have taken if living death intestate's shall be divided in like manner in accordance clause (a) or clause (b) as the case may be
- (d) Where a remoter lineal descendant of the intestate has died during the life-time of the intestate, the provisions of clause (c)

New shall apply mutatis mutandis to the division of anv share to which he or she would have entitled heen living at the intestate's death reason of the predecease of all the intestate's lineal descendants directly between him or her

and the intestate

54 If Division of pre deceased child a share of intestate s property among the widow or widower and issue of such

child.

any child of a Parsi intestate has died in his or her life-time. the widow or widower and nf such issue child shall take the share which

such child would have taken if living at the intestate's death in such manner as if such deceased child had died ımmediately after the intestate's death

Division of property where intes tate leaves no lineal descendant but leaves a andow or widow of

ing rules, namely

Where a Parsi dies Section 5 without leaving Act XXI of any lineal des- 1865 cendant but leaving a widow or widower Ωr widow of a lineal widower or a descendant. a lineal descendant property which the ıntestate dies intestate shall be divided in accordance with the follow-

> (a) If the intestate leaves a widow or widower but widow of a lineal descendant, the widow or widower shall take half the said property

(b) If the intestate leaves a widow or widower and also a widow of anv

New lineal descendant. his widow or her widower shall re ceive one-third of the said property, and the widow of any lineal descendant shall receive another one-third. or if there is more than one such widow, the last mentioned one-third shall be divided equally among them

- (c) If the intestate leaves no widow or widower but one widow of a lineal descei dant, she shall receive onethird of the said property or, if the intestate leaves no widow or widower but more than one widow of a lineal descendant, two thirds of the said property shall divided among such widows in equal shares
- (d) The residue after the division specified in clause (a), (b) or (c) has been made shall be distributed among the relatives of the intestate in the

Now order specified in Part I of Schedule The next-ofkm standing first in Part I of that Schodule shall be preferred to those standing second, the second to the third and so on in succession, provided that the property shall be so distrihuted that each male shall take double the share of each female standing in the same degree of propin-

quity

(c) If there are no relatives entitled to the residue under clause (d), the whole of the residue shall be distributed in proportion to the shares specified among the persons entitled to receive shares under this

35 On a Parss dying intestate leaving him surviving a widow sons, daughters the children of a predeceased son and the childrens wow of another p edeceased son and a posthimnous daughter born afterwards to the testator the son's widow is entitled to a monety of the share in the intestat's estate which would have fallen to her husband had he died immediately after the intestate and the other monety of such share devolves on the surviving issue of the intestate including the posthimnous daughter and the children of his other pre-deceased son. It is not a condition precedent to the application of this section that the predeceased son of an intestate Paris shall have left a widow and issue—Mankhery in Mithibal 1 Bom 506 (510).

Widower —P a Parsi having died intestate a share in his estate was claimed by the plaintiff being the widower of D one of P s daughters who had pre

occased P Before the death of P the plaintif had married again. Held that he was none the less a widower of D within the meaning of this section and vas therefore entitled to the share claimed by him in Ps estate the word widower signifying a widower relatively to the deceased wife only and without consideration of the fact or possibility of the widower remarring. If the framers of the Act had wished to provide against remarringe they might have used adequate language for the purpose as in Arts 10 and 14 or the Schedule (corresponding to Schedule II Part II of the present Act) and the omission to employ similar express words for cases falling under this section is significant—

[Pathentin V Perapha II 18 mm 1 (5)]

55

Section 6 Act XXI of 1865 Division of property when the intestate leaves a widow or widower but no lineal descendants 55 Where a Parsi dies leaving a widow or widower, but without leaving any lineal descendants,—

- (a) his or her father and mother, if both are living or one of them if the other is dead, shall take one moiety of the property in respect of which he OF she dies intestate, and the widow or widower shall take the other mosety provided that. where both the father and the mother of the intestate survive him or her the father's share shall be double the share of the mother.
- (b) where neither the father for the mother of the intestite survives him or her, the

New When a Parsi dies

neither leaving descenlineal dants TOF Division of widow or widowproperty where inteser nor a widow tate leaves lineal neither lineal οf anv descendants descendant. nor a widow or her next of of any lineal descendant kin, in the order set forth in Part

II of Schedule II, shall be entitled to succeed to the whole of the property of which he or she dies intestate standing The next-of-kin first in Part II of that Schedule shall be preferred to those standing second, the second to the third and so on in succession, provided that the property shall be so distributed that each male shall take double the share of each female standing in the same degree of propin auity

Old.

intestate's relatives on the father's side. in the order specified in Part I Schedule II take the moiety which the father and mother would have taken if they had survived the intestate The next of kin standing first in Part I of that Schedule shall be preferred to those standing second. the second to the third, and so on in succession, provided that the property shall be so distributed as that each male shall double the share of each female standing in the same degree of propinquity,

(c) where there are no relatives on the father's side. the intestate's widow or widower shall take the whole

56 Division of property when the intestate leaves neither widow nor widower nor lineal descendants

When a Parsi dies leaving neither lineal descendants nor а widow or widower, his or her next of kin, in the order set forth in Part II of Schedule

56

Division of property where there is no relative to succeed under the provisions of this Chapter

died intestate, the said pro-

Where there is no Section? relative entitled Act XXI of to succeed under the other proviof this Stons Chapter to the property which a Parsi has

II, shall be entitled to succeed to the whole of the property is to which he or she dies intestate. The next of Lim standing first in Part II of the same Schedule shall be preferred to those standing second, the second to the third, and so on in succession, provided that the property shall be so distributed as that each male shall take double the share of each female standing in the same degree of propinguity

perty shall be divided equally among those of the intestate's relatives who are in the nearest degree of kindred to him"

Amendments .... Sections 50 to 56 have been amended by Act XVII of 1939 At pre ent the law that governs intestate succession among Parsis is that laid down in 1865 in Act No XXI of that year. It is true the said Act has been repealed by the Indian Succession Act No XXXIX of 1925 but this has made no change in the law as all the provisions of the Act of 1865 have been incor porated verbatim in secs 50 to 56 and Schedule II Parts I and II of the Act of 1925 It has been felt for a long time by members of the Parsi Community that this enactment more than 70 years old requires amendment both in form and substance for amous reasons. The meaning of some of its provisions is doubtful some of these doubts have been removed by judicial decisions. It is also in complete in some respects and some of these deficiencies have had to be supplied by other judicial decisions Certain other changes seem necessary in accordance with present day Parsi sentiment and usage The arrangement and language also require ome revision. In order to remove doubts supply deficiencies incorporate as far as possible the judicial decisions which the community has accepted introduce changes commonly desired and make the arrangement more systematic it has been thought best to redraft the whole enactment. In making the redraft so far as arrangement and language are concerned other parts of the Act of 1925 have as far as possible been followed eg by introducing sub headings as in the previous Chapter relating to intestate succession among non Parsis so as to give a grasp of the subject as a whole For convenience the new sections of the Draft Bill have been numbered 50 to 56 so that they may be substituted for the original sections of the Act of 1925 now in force -Statement of Objects and

Reasons V de Calcutta Gazette 27th April 1939 Part VI p 56

### PART VI

### Testamentary Succession

### CHAPTER I

## Introductory

- 57 (1) The provisions of this Part which are set out Section 2
  Application of cer in Schedule III shall, subject to the Hindu Wills
  activation of Partio
  a class of wills made by
  therein, apply—
  therein, apply—
  therein, apply—
  - (a) to all wills and codicils made by any Hindu, Buddhist, Sikh or Jaina, on or after the first day of September, 1870, within the territories which at the said date were subject to the Lieutenant-Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay, and
  - (b) to all such wills and codicils made outside those territories and limits so far as relates to immoveable property situate within those territories or limits, and
  - (c) to all wills and codicils made by any Hindu, [New] Buddhist, Sikh or Jaina on or after the first day of January 1927 to which those provisions are not applied by clauses (a) and (b)

Provided that marriage shall not revoke any such will or codicil

Change —Clause (c) has been added by the Indian Succession Ariend ment Act XVIII of 1929 This amendment comes into force from the 1st day of January 1927

As a result of this legislation all stills made by Hindius Tainas Skihs or Buddhists in any part of British India on or after 1st January 1927 must be reduced to writing signed and attested. But all wills riade by a Hindiu etc before the 1st January 1927 outside the areas governed by the Hindiu Wills Act 1e outside the province of Bengal and the Presidency towns of Madria and Bombay were valid even if made orally or unattested. See Note 52 under sec 63.

36 "Hindu" -The word Hindu is used in a theological as distin guished from a national or racial sense. A European does not become a Hadu merely because he professes a theoretical allegiance to the Hindu faith or is an ardent admirer and advocate of Hinduism and its practices but if he abdicates his religion by a clear act of renunciation and adopts Hinduism by undergoing formal conversion gives up his Christian name deliberately a umes a Hindu name marries a Hindu person in accordance with Hindu religious rites cuts himself off from his old environments and takes to the Hindu mode of life in such a case the Court may justly come to the conclusion that he has become Hindu within the meaning of this Act-Ratansi v Administrator General 52 Mad 160 55 MLJ 478 AIR 1928 Mad 1279 (1283) 111 IC 364 Cutchi Memons are not Hindus within the meaning of this section they are Mahomedans to whom the Mahomedan law is to be applied-In re Haji Ismail 6 Bom 452 (460) See also Han Oosman v Haroon Saleh Mahomed 47 Bom. 369 (383) As to who are and who are not Hindus or Buddhists see notes under sec 29

Section 331 Act X of 1865 General application of testamentary succession to the property of any Muhammadan, nor, save as provided by section 57, to testamentary succession to the property to any Hindu, Buddist, Sikh or Jania, nor shall they apply to any will made before the first day of January, 1866

Section 2 Act X of 1855 (2) Save as provided in sub-section (1) or by any other law for the time being in force, the provisions of this Part shall constitute the law of British India applicable to all cases of testamentary succession

36A A Chinaman may be either a Buddhist or a Christian. If he is a Confucian the provisions of Part IV regarding testamentary succession shall apply to his estate—Leong Home v. Leon. 7 Rang. 720 A IR. 1930. Rang. 42 (43) 121 IC 796

### CHAPTER II

## OF WILLS AND CODICILS

Section 46 Act X of 1865

Person capable making wills 59 Every person of sound mind not being a minor may dispose of his property by will

Explanation 1—A married woman may dispose by will of any property which she could alienate by her own act during her life

Explanation 2 —Persons who are deaf or dumb or blind are not thereby incapacitated for making a will if they are able to know what they do by it

Explanation 3—A person who is ordinarily insane may make a will during an interval in which he is of sound mind

Liplanation 4—No person can make a will while he is in such a state of mind, whether arising from intoxication or from illness or from any other cause, that he does not know what he is doing

#### Illustrations

(1) A can perceive what is going on in his immediate neighbourhood and can answer familiar questions but has not a competent understanding as to the nature of his property or the persons who are of kindred to him or in whose favour it would be proper that he should make his will A cannot make a valid will

(n) A executes an instrument purporting to be his will but he does not understand the nature of the instrument nor the effect of its provisions. This instrument is not a valid will

(iii) A being very feeble and debilitated but capable of exercising a judgment as to the proper mode of disposing of his property makes a will. This is a valid will

Note —This section applies to Hindus Buddhists etc ee sec 57 and schedule III

Sound mind -In order to constitute a sound disposing mind the testator must not only be able to understand that he is by his will giving the whole of his property to the object of his regard but must have capacity to comprehend the extent of his property and the nature of the caims of others s hom by his will he is excluding from all participation in that property. And the protection of the law is in no cases more needed than it is in those where the mind has been too much enfeebled to comprehend more objects than one and most especially when that object may be so forced upon the attention of the s walld as to shut out all others that might require consideration. For this purpose it is essential that no disorder of the mind shall poison his affections pervert hi sense of right or prevent the exercise of his natural faculties that no in one d lusion shall influence his will in disposing of his property and bring about a disposal of it which if the mind had been sound would not have been made But perversion of moral feeling does not constitute unsoundness of mind-Harwood v Baker (1840) 3 Moo P C 282 (290) Saradindu v Sudhir 50 Cal 100 (111) 69 IC 48 AIR 1923 Cal 116 Brajesuari y Rasik 85 IC 581 AIR 1925 Cal 739 (741) Lila Sinha v Birov Pratab 41 CLJ 300 87 I C 534 A I R 1925 Cal 768 (771)

A man is competent to make his will if he has sufficient memory and intelligence to be able to comprehend the nature of his propert, to remember and understand the claims of relations and friends and to have judgment of his own in disposing of his property. If a man possesses this amount of memory and intelligence he is a competent testator if he is not able to perform the mental acts mentioned then he is not a competent testator—per Warren J in Longford v Putdon 1 If R Ch 75 (77). Mere ability to sign ones name does not necessarily imply the po session of the full mental powers requisite for a valid disposition of property. Nor is sufficient to show that the testator was conscious when he executed the instrument—Surendar v. Rom. Dass. 47 Cal. 1043 (1063) 21 C.W.N. 860 Sixil Aumar v. Apsar: 19 C.W.N. 825 (833) 27 IC. 276 Verhela Arishnoja v. Annaphirm 10 M.L.T. 304 12 I.C. 333 (398) IT.

THE INDIAN SUCCESSION ACT is not sufficient in order to make a will that a man should be able to maintain as face Summaring in Giver to make a will find a first should be save to mannain ordinary CDB ereation and to answer familiar and easy questions. He must have to unitary conversation and to answer immuser and easy questions are man more mind than suffices for that He must have what the old Javyers called 1 ISEC 59 desposing mind i he must be able to dispose of his property with understand. casposing ining i ne must be able to dispose of his property white discussions and reason. This does not mean that he should make what other people has east reasons this does not mean that he should make what outer people no think a sensible will or a reasonable will or a kind will. But he must be able tunto, a s'risune win or a reasonable win or a sing win that re must be able to appreciate his property to form to understand his position he must be able to appreciate his property to many a judgment with respect to the parties whom he chooses to berefit by it after a jungment with respect to the parties whom he chooses to beyond by a audicath and if he has Capacity for that it suffices—her Cresswell J in Schlory team and it he has capacity for that it suffices—per Cresswell J in 20100 v

Hophood 1 F & F 579 Surendra v Rani Dasi supra. It is a great but no Hoppioga I e de 218 Sutenata V Kani Dasi supra. It is a great but not uncommon error to suppose that because a person can understand a question Dut to him and can five a rational answer to such question ic is of perfect For to this and can give a rational answer to such question ie is us percentaged and mind and is capable of making a will for any purpose whatever, where sound many and is capacite of making a will for any purpose whatever, where the rule of law and it is the rule of common sense is far otherwise—per Ser John Aicholl in Marash 1 Tyrrel (1828) 2 Hagg 84 (122) Juni systems in prevent 1 / 1977et (1828) 2 Hang 84 (122) In order to estimate a valid will one must have sufficient active memory to recall his family and Frogerty and to form a rational judgment in regard to the deserts of the one and the disposition of the other with reference to such deserts of the other transfer of the other with reference to such deserts per Reference J in Converse v Converse (1819) 21 Vern 188 The mere fact that the testion. had sense or consciousness or that he was able to answer a question or two put by a doctor about his illness is not sufficient to prove testamentary capacity. Toger v. Bhiku 72 IC 88 AIR 1924 Cal 512

Brajesuan v. Rank AIR

Partial insamity or unsoundness always existing although only occasionally rianifest may impair a person's Capacity to execute a valid will as where an realliest may impear a person's capacity to execute a valid will as where the testamentary disposition of his property a person was proved to have been been continued exists. cut consumentary susposation of its property a person was proved to have our cuttainted solely by an insane aversion to his daughter. So also may infinitely solved to have our constraints of the solution of or eakness cau ed by old age or illness —Parry a Law of Succession (1897) at

Degree of understanding required Wills are too f equently made by the sick and dying the degree of understanding therefore which the law The sum and dying the degree of understanding therefore which are not not not a normal standard that continue the sum of It is not enough that a testator is able to answer familiar and usual questing the must be able to exercise a competent understanding as to the general nature of the property as to the state of his family and as to the general natural of the property as to the state of his family and as to the general contents. of the property as to the state of his family and as to the general conductor which he executes and as to the general nature and general objects and it consists which it contains the general nature and general objects and it Provisions which it contains if he can do that though he may be very feel-MONSHOUSE WHICH IS CORRESS IF HE CAN GO that though he may be very second and debilitated in understanding and be at the point of death it is enough-Euroof \ Ismail 178 IC 165 AIR 1938 Rang 322

Testamentary capacity —Testamentary capacity is a relative than It is to be considered with reference to the particular will in question—the question being not whether the testator had capacity for will making but whether successful using not whether the testator had capacity for will making but whether the had capacity to make the will in suit. He may have had capacity to make the will not test not have had capacity to make the may have had capacity to make the time separately to make the war in suit. He may have had capacity to make a more complex one or he may not have had capacity to make a more complex one or he may not have find expectly to make the sull in sunt and 5ct have find capacity to make a loss complex one or ne use, a less complex or different the sull in sunt and 5ct have find capacity to make a less complex or different the sull in sunt and 5ct have find capacity to the sull in sunt and 5ct have find capacity to the sull in sunt and 5ct have find capacity to the sull in sunt and 5ct have find capacity to the sull in sunt and 5ct have find capacity to the sull in sunt and 5ct have find capacity to the sull in sunt and 5ct have find capacity to make a more complex one or necessary. instrument executed to make the will in suit and yet have had capacity to instrument executed to support one—Bigelow on Wills 74. The nature of the nance a rest compact of universit one—bigelow on Wills 74. In nature of montant Paranett, Isomeon than of completity is one ingredient of fetal mentary capacity because when you are measuring the power of a seaked intellect the quality of the subject to which it is to be applied must always be no important test — fee Try I satisfactory. an important test—for Dr I usingston in Daniell v. Confield 1 Rob Eed 63 ar important test — yer per a usungton in parnett v Corpeta a rico.

Saradindu v Sudhir 50 Cal 100 (114) 69 I C 48 A J R. 1923 Cal 116

In order that a will may be found good by the Court it need not be proved that the testator was in a perfect state of health or that his mind was so clear as to enable him to give complicated instructions. It is sufficient if it is proved that he was able to give the outlines of the manner in which his estate was to be disposed of and was able when the instrument drawn up by the lawyer was read out to him to understand that his instructions in the main had been complied with = Gordhandas v. Bai Suraj 23 Bom LR 1068 64 IC 257 A I R 1021 Bom 13 (191)

Where the will is not unnatural or unreasonable proof that the testator's mental faculties were not impaired and that he knew what he was doing is enough proof of the will and it is not necessary for the proport oder to prove that the testator was capable of appreciating the claims of those persons who were excluded by the will from participation in the property—Telu Ram v Badri Nath 100 IC 162 AIR 1927 Lah 609 (610) In the case of a will reasonable natural and proper in its terms it is not in accordance with sound rules of construction to apply to it those canons which demand rigorous scrutiny of documents that are unnatural unreasonable or tinged with impropriety—Jagram v Durga 36 All 99 (98) (PC) 16 OC 386 22 IC 103 Sarojini s. Hando. 26 CWN 113 (118)

38 Presumption and burden of proof -The onus probandi lies in every case upon the party propounding a will and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. If a party writes or prepares a will under which he takes a henefit that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and lealous in examining the evidence in support of the instrument in favour of which it ought not to n opounce unless the suspicion is removed and it is judicially setisfied that the paper propounded does express the true will of the deceased-Eusoof v Ismail 178 I C 165 A I R 1938 Rang 322 If a party impeaches the validity of a vall on account of supposed incapacity of mind in the testator it will be incumbent on such party to establish such incapacity by the clearest and most satisfactory proofs. The burden of proof-rests upon the person attempting to invalidate what on its face purports to be a legal act 2 Phill Evidence (7th Edn ) 293 Williams on Executors (11th Edn ) Vol I p 14 Sanity will be presumed till the contrary is shown-Groom v Thomas 2 Hage 434. Hence if there is no evidence of insanity at the time of giving the instructions for a will the commission of suicide three days after will not invalidate the instrument by raising an inference of previous derangement-Burrous v Burrous 1 Hage 109

In ordinary cases execution of a will by a competent testator raises the presumption (sufficient if nothing appears to the contrary to establish) that he knew and approved of the contents of the will—Prayag Kumani v Sila Prosad 42 CLJ 280 93 IC 385 AIR 1926 Cal 1 (30) Also under ordinary circumstances the competency of the testator will be presumed in rothing appears to rebut the ordinary presumption—Gambatron v Vasantian 34 Born LR 1371 FIR 1932 Born 585 (500) 141 IC 747 As the result of these two presumptions in ordinary cases at least in many cases, proof of execution of the will is enough. But where the mental capacity of the testator is challenged by evidence the Court ought to find whether the testator was of sound disposing mind and did know and approve of the contents of the will—Itoomesh v Rost mobium 21 Cal 279 (290) Ray Backan Singh v Shattany 5 OLJ 519 47 IC 9, 93

(966) The onus probands hes in every case upon the propouncer of the will and he must satisfy the conscience of the Court that the instrument so propounded is the last vill of a free and capable testator. The burden of proof thus cast upon the propounder is in general discharged by proof of capacity and the fact of execution and when these have been proved the Court will under ordinary circumstances assume from them the knowledge of and assent to the contents of the instrument by the deceased and without requiring further evidence will pronounce for the will-Surendra v Rans Dasss 47 Cal 1043 (1052), 24 CWN 860 Lila Sinha v Bijoy Pratap 41 CLJ 300 87 IC 534 AIR. 1925 Cal 768 (769) Murad v Khadim 114 PWR 1911 12 IC 49 (51) The onus is in general discharged by proof of capacity and fact of execution from which knowledge of and assent to the contents of the instrument is assumed-per Parke B in Barry v Butlin (1838) 2 Moo PC 480 the testator did know and approve of the contents of the alleged will is therefore part of the burden of proof assumed by every one who propounds it as a will This burden is satisfied prima facie in the case of a competent testator by proving that he executed it But if those who oppo e it succeed by a cross examination of the witnesses or otherwise in meeting this prima facie case the party propounding must satisfy the tribunal affirmatively that the testator did really know and approve of the contents of the will in question before it can be admitted to probate -per Lord Penzance in Cleare v Cleare LR 1 P & D 657 Surendra \ Jahnabicharan 56 Cal 390 119 IC 17 AIR 1979 Cal 484 (489) William Robins v National Trust Co Ltd 4 OWN 463 (PC) 101 IC 903 AIR 1927 PC 66 (68) Wherever a vill is prepared under circumstances which raise a well grounded suspicion that it does not express the mind of the testator-the suspicion being one inherent in the transaction itself and not the doubt that may arise from a conflict of te timony which becomes apparent on an investigation of the transaction-the Court ought not to pronounce in favour of it unless the suspicion is removed the onus to do o being on the propounder—Prasanna Kumari v Baikuntha Nath 49 Cal 137 If the --(148) 25 CWN 779 Sarojim v Haridas 26 CWN 113 (116) testator's sanity is disputed the burden of proof lies on the per on propoundingthe will to prove affirmatively that the testator was of sound mind at the date of execution and that he knew understood and approved of its contents. If the insanity of the testator before the date of the will is once established the burden of proof lies on the person propounding the will to show that it was made after the testator's recovery or during a lucid interval. If however it is rot established or habitual insanity does not exist the burden of proving actual irsanity at the date of execution of the will is shifted to the person impeaching the will-Ganpatrae \ Vasantrae 34 Bom LR 1371 AIR 1932 Bom 588 (590) 141 IC 747, Susul Kumar v Apsars 19 CWN 826 (831) 27 IC 276 I' a party writes or prepares a will under which he takes a benefit that is a circumstance which ought generally to excite the suspicion of the Court and cause it to be vigilant in examining the evidence in support of the will-Barry Butlin (supra) Raj Dulari v Krishna Bibi 7 P.LT 203 95 IC 1006 AIR 1926 Pat 269 Imayaka v Sakharam 102 IC 635 AIR 1927 Nag 261 Rangarra v Sheshappa 51 Bom 258 29 Bom L.R 327 101 IC 416 Sarat Lumars v Sakhi Chand 8 Pat 382 (PC) AIR, 1929 PC 45 (47) 113 IC 471 Where a person propounding a will is entitled to large benefit under it the Court will demand very clear and strict proof as to the genuineness of the will and of the disposing mind of the testator-Sooramma \ larabati larahalu 101 IC 828 AIR 1927 Mad 708 (709) Surendra v Inanendra 55 CLJ 189 AIR. 1932 Cal 574 (576) 139 IC 237; Ganpatrao : la antrao supra;

Vellastrams v Strataman 8 Rang 179 (PC) AIR 1930 PC 24 (25) 12

If a will is made under circumstances which incontestably show that the ildays before his death and that on the day of his death his condition was such as to necessitate the attendance of three physicians on five occasions at his bed side and the will was alleged to have been executed 2 hours before his death the Court must scrutinize with care and caution the evidence as to his death the Court must scrutinize with care and caution the evidence as to his testamentary capacity at the time of execution of the will—Susil Aumar v Apsam 19 C WN 826 (830) 27 IC 276 Where the testator was seized with cholera and it was alleged that though in the throes of that disease he still was able to summon his nearest male relative (the propounder of the will) to get him to call in writers and witnesses to dictate the will to have a draft prepared to have the will fresh copied and then to execute it held that very cogent evidence would have to be called to show that the te tator was in a position to do this having regard to his condition and the illness from which he was suffenge-Padama Praya V Dharma Dass 15 C WN 728 (729) 10 IC 985

Where a testator is of sound mind when he gives instructions for a will but at the time of signature accepts the instrument drawn in pursuance thereof believing that it has been drawn up according to his instructions then een if at that time he is not able to follow or understand all its provisions still he must be deemed to be of sound mind when it is executed—Perera v Perera [1901] A C 354 Kusum Kumari v Satishendra 13 CWN 1128 (1131) 3 IC 787 Venkata v Baggummal 23 ML J 54 14 IC 550 (552)

The mere fact that the provisions of a will are unjust (as for instance where the testator possessed of property of value exceeding 3 lakhs of rupees left only an annuity of Rs 50 a month to his wife and gave the entire estate to his infant brother) should not lead the Court to presume that the will could not have been made by a person with a sound disposing mind-Surendra v Rans Dass: 47 Cal 1043 (1065) When a will has been once made and is apparently in perfect form and the evidence of the attesting witnesses is to be trusted few things can be more dangerous than to attempt to re-create the kind of will that the man ought in the opinion of the Court to have made Once the man's mind is free and clear and is capable of disposing of his property the way in which it is to be disposed of rests with him and it is not for any Court to discover whether a will could not have been more consonant either with reason or with justice—Arunachellam v. Ramasu.ams 30 MLJ 555 (PC) 35 IC 1 (3) 20 CWN 673 A Court will not reject a will merely because its terms appear extraordinary if there is clear evidence of due execution by a competent testator. But where the terms are unusual and the evidence of testa mentary capacity doubtful the vigilance of the Court will be roused and before pronouncing for the will the Court will require to be satisfied beyond all doubt that the testator was fully cognizant of its contents and was in a condition to exercise thought judgment and reflection respecting the act he was doing-Susil Kumar v Apsart 19 CW N 826 (833) 27 IC 276

It is one of the painful consequences of extreme old age that it ceases to excite interest and is apt to be left solitary and neglected. The control which the law still gives to a man over the disposal of his property is one of the most efficient means which he has in protracted life to command the attentions due to his infirmities. For these reasons the power of disposing of property in anticipation of death has ever been regarded as one of the most valuable

THE INDIAN SUCCESSION ACT of the rights incidental to property while there can be no doubt that it operates a a useful mentive to industry in the acquisition of wealth, and to thrift and a a assent mechanic to manusary in the acquisition of weath, and to time and the fingality in the enjoyment of it. The law of every country has therefore conceded to the owner of property the right of disposing by will either of the whole or at all events of a portion of that which he possesses The Roman law and that of the Continental nations which have followed it have secured to the relations of a deceased person in the ascending and descending his fixed portion of the inheritance. The English law leases everything to the unfettered discretion of the testator on the assumption that though in some Instances caprice or passion or the power of new ties or artful continuances. or smister influence may lead to the neglect of claim that ought to be attended to yet the instincts affection and common sentiments of mankind may be safely trusted to secure on the whole a better disposition of the property of the dead and one more accurately adjusted to the requirements of each particular case than could be obtained through a distribution prescribed by the stereotyped and inflexible rules of general law — Law of Wills in India pp 75.78

Minor - Where the party opposing the will alleges that the testator was a minor at the time it was crecuted the onus of proving that the testator was not a minor lies on the party propounding the will and not on the person mas not a minor nees on the party propositions the will said not on the party propositions it—Raindar v. Rainfort 5 Lah 263 (267) ATR 1924 Lah 541

A will executed by a minor will be inoperative as a will but will be operative as a valid authority to adopt if the testator had completed the age operative as a value authority to euoppe it the testation has compared to the operation of majority under Hindu Law 16 15 years because the Indian Majority Aug. (sec 2) does not interfere with the age of majority prescribed by Hindu law tect of these tast intertests with the ege of majority prescribed by similar tensor of the prescribed by similar tensor of the ege of majority prescribed by similar tensor of the ege of majority prescribed by similar tensor of the ege of majority prescribed by similar tensor of the ege of majority prescribed by similar tensor of the ege of majority prescribed by similar tensor of the ege of majority prescribed by similar tensor of the ege of majority prescribed by similar tensor of the ege MLJ 247 89 IC 733 AIR 1925 PC 196 (197)

Expl 1 —This explanation cannot affect the provisions of the positive law contained in the section wife that a will must be made by a per on who is not Therefore a married woman of whose person and property a great that a man a many the state of th a mino, therefore a manned woman or whose person and property a guardian has been appointed by the Court is to be considered a minor till she attains the age of 21 (under sec 3 of the Indian Majority Act) and is not competed to see of a tunder see of the annual amount and and a more tompeters to the see attains that age—In se Miranda 28 CW N 527 (529) (81 IC 1008 AIR 1921 Cal 644

Expl 2—Deaf, dumb, blind persons—One who is deal and dumb from his nativity is in presumption of law an idoot and therefore incapable of making a will but such presumption may be rebutted and if it sufficiently or making a will but such presumption may be reputed and it is summernly appears that he understands what a testament means and has I desire to make one then he may by signs and tokens declare his testament—Sumbtime Part 2 one then me may by signs and tokens decrate in a restantion. Supporting First 4. pl. 2. Godolphin Part 1 11. One who is not deal and dumb by nature but being once able to hear and peak if by some accident he loses both has out only once anic to near and peak it by some accident ne toses both ms hearing and the use of his tongue then in case he shall be able to write he nearing and one use or its congact other in case the solar or able to write the may with his own hand write his last will and testament but if he be not able ray with his own hand write the best our and testament, out it the be not about to write he may make his festament by \$ cm, otherwise not at all. Such as can ereak and cannot hear they may make their te speak and hear whether that defect came b be speechless only and no make their testaments as if they could both also make their testary, of hearing 1 therwise Such as by writing to such as then be pre te may very well so that the C II Where a testal write they may criting his testamentary Part 2 s iciently known and dumb lphin Part I meupor 3 communi . d motion.

who prepared a will in conformity with such instructions which was afterwards duly executed by the testator the Court required an affidavit from the drawer of the will stating the nature of the signs and motions by which the instructions were communicated to him—In the goods of Ouston 2 Sw & Tr 461 In the roads of Goale 3 Sw & Tr 431

A blind person may make his will by declaring his intention before a sufficontinuous of witnesses. But it is not necessary that the will prepared in accordance with his declaration should be read over to him. It is sufficient if there is satisfactory proof before the Court of the testator's knowledge and approval of the contents of the will—Fincham v Eduards 3 Curt 63 affirmed 4 Moo PC 198

41 Expl 3—Lunatic, Lucid interval —A lunatic that is a person quality mad but having intervals of reason cannot during the time of his misanity make a testament nor dispose of anything by will But a will is not revoked by the subsequent insanity of the testator—Williams on Executors (11th Edn.) 401 In 914 Halsbury a Laws of England vol 28 p 582

If a lunatic person has clear or calm intermissions (usually called lucid mixed in the during the time of such quietness and freedom of mind he may make his testament appointing executors and disposing of his goods at pleasure—Swinburne Part 2 s 3 p 3 Hall v Warren 9 Ves 610 If you can establish that the party affected habitually by a malady of the mind has intermissions and if there was an intermission of the disorder at the time of the act that being proved is sufficient and the general habitual insanity will not affect it but the effect of it is thus it inverts the order of proof and of presumption for until proof of an habitual insanity is made the presumption is that the party agent like all human creatures was rational but where an habitual insanity of the mind of the person who does the act is established there the party who would take advantage of an interval of reason must prove it—per Six William Wyniue in Carturight V actuaright I Phillim Rep 100 See also Gampatrao v Vasantrao 34 Bom LR 1371 A IR 1932 Bom 588 (590)

Where it was proved that the testator had been once in a lunatic asylum long (30 years) before he executed the will but there was nothing to indicate that he was insane when he made the will the will would not be invalid—Anuar v. Scoretary of State 31 Cal. 885 (894)

42 Expl 4—Drunkenness — He that is overcome by drink during the time of his drunkenne is compared to a madman and therefore if he riake his testament at that time it is void in law which is to be understood when he is so excessively drunk that he is understanding of the use of reason and understanding otherwise albeit his understanding is obscured and his memory troubled yet he may make his testament
Swinburne Part 2 is 6 Where it appeared that the testator was a perion not

Swinburne Part 2 s 6 Where it appeared that the testator was a per.on not properly insane or deranged but habitually addicted to the use of spirituous liquors under the actual excitement of which he talked and acted in most respects like a madman still if at the time of execution of the will the testator \(\nabla\) as not under the excitement of liquor he was not to be considered as insane at the time of making his will and it was therefore valid—Ayrey \(\nabla\) Hill (1824) 2 \(\frac{4}{2}\) dd 206 (210)

Even if the testator was not wholly free from the exciting influence of drink at the time when the will was executed still if the excitement did not exist in such a degree as to prevent the testator from appreciating and understanding

the testamentary act in all its bearings, it would not invalidate the will-Surendra v. Ram Dass 17 Cal 1013 (10.5) 24 C.W.N. 850

Where a testator who was a heavy drinker was sober at the time when he went to the lawyers office to give instructions for the drawing up of a wil, the fact that he was not in a normal state of mind at the time of uguing the still was immuterial—Woolmery Mrs. Dalv 1 Lah. 173 (177)

Old age, illness, infirmity, etc -Old age alone does not deprive a man of the capacity of making a testament for a man may freely make his testament how old soeser he be since it is not the integrity of the body but of the mind that is requisite in testaments. Let if a man in his old age becomes a very child in the understanding or rather in the want thereof or by reason of extreme old age or other infirmity he becomes so forgetful that he knows not his own name he is then no more fit to make his testament than a natural fool or a child or a lunning person-Swinburne Part 2 s. 5 pl 1; Godolphin Part I c 8 s 4 Fytreme old age raises some doubt of capacity but only so far as to excite the vigilance of the Court-Kindleside v Harrison 2 Phillim 461 462 And in cases where no insanity has either existed or been supposed to exist the inquiry as to capacity simply is whether the mental faculties retain sufficient strength fully to comprehend the testamentary act about to be done when lunacy or unsoundness of mind has previously existed the investigation 19 of a totally different character-per Dr Lushington in Prinsep , Dice Sombre 10 Moo PC 278

The law does not require that the testator must possess his mental faculties in the highest degree possible or that he must possess them in as large a measure as he may formerly have done. Though the mind may be in some degree debilitated and the memory may have become in some degree enfeebled it is sufficient that there is enough left to enable the testator clearly to discern and discreetly to judge of all those things and all those circumstances which enter into the nature of a rational fair and just testament-Banks ; Goodjellow (1870) LR 5 QB 549 (567) The testator may be subject to serious infirmities affecting more or less his mental vigour and jet be equal to making his will-Bannister . Bannister 45 N J Eq 702 Westcott . Sheppard 51 N L Eq 310 (318) A will cannot be invalidated by mere proof of serious illness and general intemperance of the testator in order to set it aside there must be clear evidence that the illness of the testator so affected his mental faculties as to make them unequal to the task of disposing of his property—But Singh Uttam Singh 38 Cal 355 (367) (PC) Natain Deo v Kusum Kumars 40 IC 597 (603) (Pat) Nabagopal v Sarala 57 CLJ 71 AIR 1933 Cal 574 (575)

In Swinfen v. Swinfen 1 F. & F. 584 a will made by a testator in extreme on the last stage of bodily infirmity was held to be valid. In charging the jury Byles J. said. To constitute a good testamentary disposition the testator must retain a degree of understanding to comprehend what he is doing and to have a volution or power of choice so that what he does really be his own doing and not the doing of anybody else. The faculties in the two great divisions of the understanding and the will must still test. They may have declined from their former comprehensiveness and vigour they may be and often are on such occasions weak and actually on the point of bears extinguished still though they may be as it were flickering in the socket yet if they suffice to show the germine and last behests of a rational creature and receive and the socket will be sufficiently that the socket will be set to the socket will be sufficiently the set of the socket will be sufficiently the set of the socket will be set of the set of the socket will be set of the set

condition. It is not enough that a testator is able to answer familiar and usual questions. That had always been laid down. He must be able to exercise a competent understanding as to the general nature of the property as to the state of his family and as to the general condition and claims of the objects of his bounty as to the nature of the instrument which he executes and as to the general nature and general objects and the provisions which it contains. If he can do that though he may be very feeble and debilitated in understanding and he at the pout of death it is enough.

A person suffering from paralysis and infirmity which makes his physical provement difficult as still competent to make a will if he is perfectly conscious and understands fully what he is doing at the time. Normal's Saratman, 25 Cal. 911 (914) A permanent paralytic attack whilst it must to some extent diminish the physical energy of the sufferer does not necessarily impair his mental powers to such an extent as to render him incapable of transacting business or of executing a will Even in cases where the mental faculties of the person affected have been greatly enfeebled by physical weakness he may still be capable of devising and intelligently executing a will of a simple character although unfit to opposite or to comprehend all the details of a complicated settlement testator may not be in his full senses, he may be feeble in hody the vicour of his mind may be impaired his utterance may be defective but still if there is nothing to lead to the inference that he is incapable of understanding such business as falls to his lot or of regulating the succession to his property his Will cannot be impeached—Sould Ali \ Ibad Ali 23 Cal 1 (10 11) (P.C.) But where a person who was enfectled by age and was paralysed so that he could not dictate a long will is alleged to have left a will the fact that it was written by one of the legatees that no signature of the testator was found but his thumbmark only coupled with the fact of absence of registration which could easily have been made and the fact that the attesting witnesses were interested are circumstances to show that the will is not genuine-Rukman v. Sain Day 71 PR 1916 32 I C 875 A person suffering from a virulent type of plague (of which he died within three days from the date of the will) cannot be said to have had sufficient mental capacity to understand the extent of his estate and the nature of the claims of those excluded from all participation in the property and the will is consequently invalid-heugt: v Chadu Lal 123 PR 1916 36 TC 985

If a will is prepared according to the previously given instructions of the testator it is not necessary that at the time when he puts his signature to the will he must be able to follow every sentence of the will if at that time he is suffering from illness (to which he ultimately succumbed) but is possessed of sufficient intelligence to be able to understand the provisions of the will it is sufficient-Kusum Aumari , Salis Chandra 13 CWN 1128 (1132) 3 IC 787 In Perera v Perera (1901) AC 354 their Lordships of the Privy Council went still further and observed that it was sufficient that the testator was of ound mind when he gave his instructions for his will and the will wa drawn in oursuance of those instructions and it was not necessary that he should be capable of understanding its provisions at the time of the signature. In another English case it has been laid down that if a testator has given instructions to a solicitor to make a will and the solicitor prepares it in accordance with those instructions, all that is necessary to make it a good will if executed by the testator is that he should be able to think thus far I gave my solicitor instructions to prepare a will making a certain disposition of my property; I have no doubt that he has given effect to my intention and I accept the doru

ment which is put before me as currying it out-Parker v. Felgate (1883) 8 P D 171 In this case a testatrix lying in a state approaching insensibility executed a will drawn up in accordance with her previous instructions. It was held that although she might not remember the in tructions, and although she could not have understood the will even if read to her clause by clause yet since she was capable of understanding and did understand that she was engaged in executing the will for which she had given instructions she must be taken to have known and approved of its contents. And so it has been held in a Calcutta case that where a testator has given instructions for the will while in health and executes the documents prepared in accordance therewith while in illness slight proof of knowledge and approval will suffice and the will be valid even though at the time of execution the testator merely recollects that he has given those instructions but believes that the will which he is executing has been prepared in accordance with them-Saradindu v Sudhir 50 Cal 100 (114) 69 IC 49 AIR 1923 Cal 116 See also Venkata v Baggrammal 23 MLJ St 14 I C 550 (552)

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Delusion —A man moved by capricious frivolous mean or een bad motives may disinherit wholly or partially his children and leave his property to strangers. He may take an unduly harsh view of the character and conduct of his children but there is a limit beyond which it will cease to be a question of harsh unreasonable judgment and then the repulsion which a parent exhibit to his child must be held to proceed from some mental defect. There is a point at which such repul ion and aversion are themselves evidence of unsoundness of mind.

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Delusion —A man moved by capricious frivolous mean or even bed motives may disinhent wholly or partially his children and leave his project to stranger. He may take an unduly harsh view of the chrarcter and conduct of his children but there is a limit beyond which it will cease to be a questor of harsh unreasonable judgment and then the repulsion which a parent exhibits to his child must be held to proceed from some mental defect. There is a point at which such repulsion and aversion are themselves evidence of unsounders of mind.

It is now settled law that the mere cu tence of a delusion is not sufficient to deprive a man of testamentary capacity. It is a question of evidence whether the delusion affected the disposition. The law does not say that a man is macapacitated from making a will if he proposed to make a disposition of his property moved by capacious friviolous mean or even bad motives. Every one is left free to choose the person upon whom he will bestow his property after death entirely unfettered in the selection he may think proper to make. He

ment which is put pelore me as current it out -Parker v Felgale (1883) 8 P D 171 In this case a testatrix lying in a state approaching inscribibity executed a will drawn up in accordance with her previous instructions. It was held that although she might not remember the instructions and although she could not have understood the will even if read to her clause by clause jet since the was capable of understanding and did under and that she was engaged in executing the will for which she had given instructions she must be taken to have known and approved of its contents. And so it has been held in a Calcutta case that where a testator has given instructions for the will while in health and executes the documents prepared in accordance therewith while in illness slight proof of knowledge and approval will suffice and the will be valid even though at the time of execution the testator merels recollects that he has given those instructions but believes that the will which he is executing ha been prepared in accordance with them-Saradindu v Sudhir 50 Cal 100 (114) 69 IC 48 AIR 1923 Cal 116 See also Venkata v Bassiammal 23 MLJ 54 14 I.C. 550 (552)

Where the testator was in a state of high fever and of extreme and in creasing weakness was too exhausted to speak to sit up or to write and fell back after detating one clause of his will and his hand was so shake, that he could not hold the pen properly and another man guided his hand to see held that he was capable of a testamentary act—Sala Vahomed v Dame Jonke 22 Bom. 17 (37) (PC) A will made by a dying woman practically at deaths door drawn up by a person who was adverse to the caveator who would have been entitled to one half of the property and under the influence of such person cannot be held to be the result of a free and independent volition of the testator and it must be held that there was not a sound disposing mind—India Nation V Onkar Led 20 PR 1912 10 IC 130.

Where a testator who was a young man of 21 who had been ill with feet and diarrheea for 2 months prior to his death wrote a will whereby he ignored all his real relations and gave his property to a distant aunt who sened him during his illness held that it must be strictly proved that the testator understood all the terms of the will and not merely that it was his will that he was signing. The mere fact that he could answer some simple question is not proof of a unid disposing mind. In such a case the testator must be able to understand the extent of the property the nature of the claims of others and that he was excluding them in favour of a distant relation otherwise he is not a competent testator—Brugeswar v. Rasil. Chandra 85 IC 581 AIR 1925 Cal 739 (741)

Delusion —A man moved by capticious frivolous mean or even bed motives may disanhent wholly or partially his children and leave his properly to strangers. He may take an unduly harsh view of the character and conduct of his children but there is a limit beyond which it will cease to be a question of harsh unreasonable judgment and then the repulsion which a parent ethnist to his child must be held to proceed from some mental defect. There is a posit at which such repulsion and aversion are themselves evidence of unsoundness of mind.

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Delusion —A man moved by capticious fittolous mean or even be movines may disinherit wholly or partially his children and leave his properly to strangers. He may take an unduly harsh view of the character and collect of his children but there is a limit beyond which it will cesse to be a question of harsh unrea ontable judgment and then the repulsion which a parent explisit to his child must be held to proceed from some mental defect. There is a post at which such repulsion and aversion are themselves evidence of un oundness of mind.

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may disinherit either wholly or partially his children and leave his property to strangers to gratify his spite or to charities to gratify his pride and effect must be given to his will however much the course he has pursued may be condemned -Law of Wills in India p 78 (Henderson on the Law of Succession 5th Ed

Hindu Women -The Hindu Women's Rights to Property Act (Act) No XVIII of 1937 as amended by Act No XI of 1938) has conferred on the Hundu widow the right of inheritance along with a son grandson or great grand son By the provisions of the said Act any interest devolving on a Hindu widow shall be limited interest known as a Hindu woman's estate. She is incompetent to make a testamentary disposition of her husband's property

A father, whatever his age may be, may by will Section 47 appoint a guardian or guardians for Act X of Testamentary guardian his child during minority

This section does not apply to Hindus Buddhists etc

44 A will merely appointing a guardian is not entitled to probate—Re Morton 3 Sw & Tr 422

61 A will or any part of a will, the making of which Section 48 has been caused by fraud or coercion, Act X of 1865 Will obtained by fraud or by such importunity as takes away coercion or importu nity the free agency of the testator, is void

#### Illustrations

(1) A falsely and knowingly represents to the testator that the testator's only child is dead or that he has done some undutiful act, and thereby induces the testator to make a will in his As favour such will has been obtained by fraud and is invalid

(a) A by fraud and deception prevails upon the testator to bequeath a legacy to him. The bequest is youd

(111) A being a prisoner by lawful authority makes his will The will is not invalid by reason of the imprisonment

(w) A threatens to shoot B or to burn his house or to cause him to be arrested on a criminal charge unless he makes a bequest in favour of C. B in consequence makes a bequest in favour of C. The bequest is void the making

of it having been caused by coercion

(v) A being of sufficient intellect if undisturbed by the influence of others to make a will yet being so much under the control of B that he is not a free agent makes a will dectated by B. It appears that he would not have executed the will but for fear of B. The will is in and it.

the will but for tear of B. The will is invalid

(vi) A being in so feeble a state of health as to be unable to resist importunity is pressed by B to make a will of a certain purport and does so merely to purchase peace and in submission to B. The will is invalid.

(ii) A being in such a state of health as to be capable of exercising his own judgment and volition B uses urgent intercession and persuasion with him to induce him to make a will of a certain purport. A in consequence of the intercession and persuasion but in the free exercise of his judgment and volition makes his will in the manner recommended by B. The will is not rendered invalid by the intercession and neversission of R. by the intercession and persuasion of B

(m) A with a view to obtaining a legacy from B pays him attention and flatters him and thereby produces in him a capricious partiality to A B in consequence of such attention and flattery makes his will by which he leaves a legacy to A. The bequest is not rendered invalid by the attention and flattery

Note -This section applies to Hindus, Buddhists, etc.; see sec. 57 and Sch. III

IC 159

45 'Any part of a will' — If a part of a will has been obtained by fraud probate ought to be refused as to that part and granted as to the rest—Allen v McPherson 1 HLC 191 Similarly where under influence is excreted over the mind of the testator in making the will the provisions in the will in favour of the person exercising that influence are void but the will may be good as far as respects the other parties so that a will may be valid as to some parts and invalid as to others or may be good as to one party and bad as to another—Trimitiston v D Allon 1 Dow (NS) 85

Where a portion of a will has been introduced through fraud or inadvertexe, such portion may be rejected and probate granted of the remainder if the two are severable—Girish Chandra v Rathara i CLJ 109, Rhodes v Rhodes LR. 7 App Cas 192 Sarat Kumari v Sakhi 8 Pat 382 (PC) 113 IC 471 AIR. 1929 PC 45 (50) But where the rejection of a part of will on the ground of its having been introduced by fraud alters the sense of the remainder it may be questioned whether there is a valid will at all—Rhodes v Rhodes LR 7 App Cas 192 Morrell v Morell 7 PD 68

Fraud -For definition see sec 17 Indian Contract Act Where the health of the testatrix was far from satisfactors due to mental and physical illness for a long time and the legatee who had considerable in fluence over the testatrix misrepresented to her and made her believe that she was heavily indebted to her (legatee) and got execution of the will in cons deration of such pecuniary indebtedness and help it was held that the will was procured by fraudulent misrepresentation and was therefore void-Nabalotal v Sarala 57 CLJ 71 AIR 1933 Cal 574 (576) 146 IC 414 Where a person who had been enseebled by a painful illness for some months before the will was executed was led into the belief that his wife was neglecting him and that she and her father were only after his property and where the testators father and brother in order to mislead the testator into the belief that his wife was neglecting him did not write to her about his helath nor send her any money to come down to him though the testator asked them to do so and the testator thereby conceived an unreasonable dislike of his wife and executed a will depriving her of the custody and guardianship of all his children and granting her a petty maintenance which he could not have done if his mind towards her had not been poisoned by his father and brother held that the will was not valid—Govindasuami v Kannammal 51 MLJ 747 AIR 1977 Mad 295 99 1 C 393 Where the testator at the time of his death wa persuaded by his nephew to make a will entirely depriving his widow and the will contained false allegations about her chastity etc and give the whole estate to his nephew held that the will being obtained by means of misrepresentation and fraud could not stand—Parbats v Sheo Bals AIR 1926 Outh 262 91

47 Coercion —For definition see see 15 Indian Contract Act
If it can be demonstrated that actual force was used to compel the testator
to make the will there can be no doubt that although all the formalities have
been compiled with and the party was perfectly in his senses yet such a will can
never stand—Mountain v Bennett 1 Cox 355 (per Eyre C B).

So it is in case of fear. Thus, if there were at the time of bequeathing a fear upon the testator it could not be libera columns but it is not every fear or a vain fear that will have the effect of annulling the will but a just fear that it, such as that without at the testator had not made his testament at all at least not in that manner. A vain fear is not enough to make a testament void; but it must be such a fear as the law intends when it expresses by a fear

that may cadere us constantem vurum as the fear of death or boddy hurt or of imprisonment or of loss of all or most part of one s goods or the like whereof no certain rule can be delivered but it is left to the discretion of the Judge who ought not only to consider the quality of the threatening but also the persons as well threatening as threatened in the persons threatening his power and disposition in the person threatened the sea. age courage pusillanimity and the like—Sunburne Part 7 s 2 pl 1 7 Godolphin Part 3 c 25 s. 8 see also Nelson y Oddfeld 2 Vern 76

- 48 Importunity —Importunity in its correct legal acceptation must be such importunity as he is to weak to resist such as will render the act no longer the act of the deceased the free act of a capable testator—Kindleside v Harrison 2 Phillim 551 552 (per Sir John Nicholl) Thus if a man makes a will in his sickness by the over importunity of his wife to the end he may be quiet but this shall be said to be a will made by constraint and shall not be a good will—Hacker v Newborn Styles 427 If a will was executed under pressure it would not be invalid on that ground alone unless the pressure was so great that the testator was unable to resist and had not free volution—Jajnesh warm v Ugreshwari 11 CWN 824 (825)
- Undue influence -For definition see sec 16 Indian Contract Act Whatever influence constrains a person to do what is against his will and what he would not do if left to himself is undue influence however the control is exercised-Wingrove v Wingrove 11 P D 81. To be undue influence in the eye of the law there must be coercion. It is only when the will of the person who becomes a testator is coerced into doing that which he or she does not desire to do that it is undue influence-Ibid Baudains v Richardson [1906] AC 169 Craig v Lamoureux [1920] AC 349 The term undue influence used in relation to wills has a more limited meaning than it bears as operating on contracts and gifts. These latter are set aside if it can be shown that by reason of a relationship one was in a position to dominate the will of the other But in the case of a will relation is no evidence of coercion or dominion exercised over the testator against his will or of coercion so strong that it could not be resisted-Parfitt v Lauless LR 2 P & D 462 The question of undue influence must not be mixed up with that of incapacity since incapacity is one thing and undue influence another-Sayad Muhammad v Fatteh Muhammad 22 Cal 324 (PC) though the proof of one is not irrelevant to the proof of another (Levelt v Levett 1 F & F 581) for the exercise of undue influence is greatly facilitated by feeble health produced by disease distress or age-Woomesh v Rashmohini 21 Cal 279 Bur Singh v Uttam Singh 38 Cal 355 (P.C.)

The influence to vistate an act must amount to force and coercion destroying free agency it must not be the influence of affection and attachment it must not be the mere desire of gratifying the wishes of another for that would be a very strong ground in support of a testamentary act further there must be proof that the act was obtained by this coercion by importunity which could not be resisted that it was done merely for the ake of peace so that the motive was tantamount to force and feral-Williams v Goude 1 Hagg 581 Constable v Tulnil 4 Hagg 485 Sefton v Hopiuod 1 F & F 578 Lovet v Lovett 1 F & F 581 To make a good will a man must be a free agent. But all influences are not unlawful Persussion appeals to the affections or ties of kindred to a sentiment of gratitude for past services or pity for future destitution or the like—these are all legitimate and may be faurly pressed on a testator On the other hand pressure of whatever character, whether acting on the fears

THE INDIAN SUCCESSION ACT or the hopes, if so exerted as to overpower the volution without convincing the or the nopes, it so exerted as to overpower the volution without convincing sudgment is a species of restraint under which no will can be made. Importantly Judgment is a species of restraint under which no will can be made. Imputument or threats such as the festator has the courage to resist moral command ascend ISEC. 61. or tuteats such as the testator has the courage to resist moral command assessed and yielded to for the sake of peace and quiet or escaping from distress of made and stretch to for the sake of peace and quiet or escaping from distress or many or social discomfort—these if carned to a degree in which the free play of the or social disconnort—these if carried to a degree in which the free play of the festator's judgment discretion or with its overborne will constitute undue influence. testator's judgment discretion or with is overborne will constitute undue interest.

though no force is either used or threatened. In a word, a testator may be kd. tranger no notes is either used or threatened. In a word, a testator may be so, but not driven; and his will must be the offspring of his own volution, and see but not officers and his will must be the offspring of his own volution, and ische record of any one else's --per Lord Penzance in Hall v. Hall LR IP &

In a popular sense we often speak of a person exercising undue influence over another when the influence certainly is not of a nature which would not on a nature which would not on the influence certainly is not of a nature which would not only the contract of th over another when the influence certainly is not of a nature which would validate a will influence in order to be undue within the meaning of a second control of the contr various a war summerce in order to be undue within the meaning or a mule of law which would make it sufficient to vitiate a will must be an influence of the contract of the c tute of the which would make it sufficient to vitate a will must be an induced exercised other by Coercion or by fraud.

In the interpretation of those works the contract of some latitude must be allowed. In order to come to the conclusion that a will some facture must be allowed. In order to come to the conclusion that a such has been obtained by coercion it is necessary to establish that actual videoby has been obtained by coercion it is necessary to establish that actual violences are used or even threatened. The conduct of a person in vizorous hards the success used or even threatened. The conduct of a person in vigorous nearest though not unsound in mind may be also as to excite terror and make him execute as his will an instrument which if as to excite terror and make him execute as his will an instrument which is had been free from such influence he could not have executed. Imaginary terror may have been created sufficient to deprive him of free agency a will this made may possibly be described as obtained by coercion. So as to fraid if a naue nay possibly be described as obtained by coercion. So as to trave, as which y falschood raises prejudices in the mind of her husband against him. who would be the natural objects of his bounts and by contrivance keeps had from intercourse with his relatives to the end that these impressions which should be head their from the continuous to the end that these impressions which end thous state represents a sum of the conditions of the condition of the conditions are summarized to the conditions of th contribution are mad thus formed to their disadvantages may never be removed such and the contribution of any will executed under false impressions thus kept alive it is however to any was essented under talse impressions thus kept alive. It is however as the abstract what acts will constitute under information of the abstract what acts will constitute under information of the abstract what acts will constitute under information of the abstract what acts will constitute under information of the abstract what acts will constitute under information of the abstract what acts will constitute under information of the abstract what acts will constitute under information of the abstract what acts will constitute under information of the abstract what acts will constitute under information of the abstract what acts will constitute under information of the abstract what acts will constitute under information of the abstract what acts will constitute under information of the abstract what acts will constitute under information of the abstract what acts will constitute under information of the abstract what acts will constitute under information of the abstract what acts will constitute under information of the abstract what acts will constitute under information of the abstract what acts will constitute under information of the abstract what acts will constitute under information of the abstract whether the abstract whether the abstract whether information of the abstract whether the abstract which in the abstract whether the abstract whet in a question of this nature let is sufficient to say that allowing a fair lability of constitutions that allowing a fair lability of constitutions. an a question of this nature. It is sufficient to say that allowing a fair nature of construction they must range themselves under one or other of these heads on construction they must range themselves under one or other of these non-coercion or fraud — per Lord Cranworth in Boyse v Rossborough 6 H L C &

The undue influence must be an influence exercised in relation to the will itself not an influence must be an influence exercised in relation to the months to other matters of transactions. It is not hit their not an influence in relation to other matters or transactions. It is not it must be shown further that the testator's will was dominated by the propounder but ti must be shown further that the influence was exercised on the particular occ. as on and the will was the result of that influence was exercised on the particular was as an and the will was the result of that influence—Nabagopal v. Sarala 57 CLI. sout and the will was the result of that influence. Nabagopal v Sarala of the carried too far. Where 2 (577) 146 IC 414 But the principle must not be will wish carried too far Where a jury sees that at and near the time when the will rest executed the alleged testator was m other important transactions so under the influence of the overcombination of the overcombinations and the important transactions so under the influence of the overcombinations and the important transactions are not overcombined to the overcombination of the ove the influence of the person benefited by the will that as to then he was not a free agent but was assume under the person benefited by the will that as to them he was not many be assumed to the person benefited by the will that as to them he was not be assumed to the person benefit to are innected or the person benefited by the will that as to them he was ina free agent but was acting under undue control the circumstances may be
such as fairly to receive the under undue control the circumstances may be a rice agen, but was acting under undue control the circumstances may acknow a fairly to warrant the conclusion even in the absence of evidence beautiful control to the circumstances of evidence of evidence control to the circumstance of evidence control to the cir durectly on the execution of the will that in regard to that also the same under unstuly on the execution of the will that in regard to that, influence was exercised—Boyse v. Rossborough 6 H L C 6

Undue influence must be distinguished from persuations and intercessors. Thus it is not unlawful for a man by honest intercession and presuasions and intercession awill in factors of become Procure a will in favour of binself or another person neither is it to induce the testator by fair and flattering exposed. produce a visit in tayour of numerit or another person neither is it to nucleoted to influence the dispositions specifies for though persuasion may be en ployed to influence the dispositions in a will this does not amount to influence in the legal sense and whether as not a will this does not amount to influence in the legal sense and whether of not a Caphicous partiality has been shown

the Court will not inquire But where persuasion is used to a testator on his death bed when even a word distracts him it may amount to force and inspiring fear—per Sir Wilham Wynne in Dickinist in Was Preng T 1790 Wilhams on Executors (11th Edn.) Vol I p 31. Advice or even persuasion cannot be said to be unlawful unless it deprives the testator of the freedom of will and amounts to ocercion—Warana v Kausum Kuman 40 IC 597 (604) (Pat.) If a legatee by flattery succeeds in persuading a testator to make a will in his favour it will be upheld unless it is tainted with fraud—Parbati v Sheo Bali AIR 1956 Oudh 262 91 IC 159

A wife may therefore very justly use her wifely influence for her own benefit or that of others-Perkins v Perkins 116 Iowa 253 If a wife by her virtues has gained such an ascendancy over her husband and so rivetted his affection that her good pleasure is a law to him such an influence cannot be a ground for impeaching a will made in her favour-Small v Small 4 Mer 220 Where the wife of a testator persuaded him to execute a will in supersession of a will less favourable to her but there was nothing to show that there was such importunity as took away the free agency of the testator held that the influence which she exercised was not such as to deprive the testator of his judgment and volution and was not therefore undue influence-Morisan v Administrator Gene ral 7 Mad 515 (530) All the difficulties of defining the point at which influence exerted over the mind of a testator becomes so pressing as to be properly described as coercion are greatly enhanced when the question is one between husband and wife. The relation constituted by marriage is of a nature which makes as difficult to inquire as it would be impolitic to permit inquiry into all which may have passed in the intimate union of affections and interests which it is the paramount purpose of that connection to cherish-Boyse v Rossborough 6 H L C 6 (per Lord Cranworth)

But influence that would be considered lawful in the case of the wife would be undue if exercised by a mistress 'epecally if such influence is prejudicial to the family—Kessinger of Kessinger of Ind 341. But where a testator possessed of properties valued at 3 lakhs of rupees left an annuity of Rs 40 a month for his mistress it did not seem to be over liberal and there was no indication that she exercised any undue influence on the testator in this matter—Surendra Rani Dasis 47 Cal 1043 (1064) 24 CWN 860 AIR 1921 Cal 677

As regards persons in fiduciary relation (e.g. guardian and ward tutor and pupil solicitor and client physician and patient) in case of gifts and other transactions inter vivos it is considered by the Courts of Equity that the natural influence which such relation involves exerted by those who possess it to obtain a benefit for themselves is an undue influence. Gifts or contracts brought about by it are therefore set aside unless the party benefited by it can show affirmatively that the other party to the transaction was placed in such a position as would enable him to form an absolutely free and unfettered judgment-Archer v Hudson 7 Beav 557 Govind v Savitri 43 Born. 173 (179) 20 Born.L R. 911 47 I C 883 Toolseydas v Prempt 13 Bom 61 (66) Sital Prasad v Parbhu Lal 10 All 535 Varanas v M 14 Bom L R 499 15 I C 785 Lakshms Das v Roop Lal 30 Mad 169 Lala Mahabu v Taj Begum 19 CWN 162 (PC) Wajid Khan v Eu aj Ali 18 Cal 545 (PC) But the law recarding wills is very different from this and the mere proof of the existence of such a relation is no evidence of undue influence and the party alleging such influence must give some evidence of coercion or dominion exercised over the testator against his will or of coercion so strong that it could not be resisted-Parfit v Lauless LR 2 P & D 462

Where a will is made in favour of a person who is in a position of active confidence with the testatria it is the duty of the Court to scan the evidence of independent volution closely in order to be sure that there had been a thorough understanding of the consequences by her This deceit practised on a mind easily led away by impressions is sufficient to annul her testament—Nabagopal vs. Sarala 57 C.L. J. 71 A.I.R. 1933 Cal. 574 (577) 146 I.C. 414

The religious influence of a preceptor or spiritual adviser or guide may sometimes amount to undue influence. Thus where in a will which the decreased executed the day before his death the testator's spiritual guide is named as the universal legatee it is incumbent upon the Court to see that the spiritual influence was not execused improperly by terrifying the dying man or by holding out hopes of benefiting his oul—Srimats Basini v Arishna Lal 51 IC 1007 (1008) (Cal). A settlement made by a widow in favour of a clergyman who obtained spiritual influence over the mind of the widow and managed her affairs was set aside on the ground of undue influence—Huguenin v Baseley 14 Ves. 273 See also Norton v Relly 2 Eden 286.

Where the factum of a will is established the rule which requires that it must be shown that the testator actually knew and approved of its contents does not apply in the absence of circumstances exciting suspicion. Undue in fluence having been exercised on the testator cannot be inferred merely from the existence of motive and opportunity for its exercise or from the fact that some of the testators relations received more benefit under the will than other relations of equal or nearer degrees—O S A No 39 of 1936 (66 LW 15 Notes)

Evidence, Burden of proof -Where it has been proved that a will has been duly executed by a person of competent understanding and appa rently a free agent the burden of proving that it was executed under undue influence is on the party who alleges it-Boyse v Rossborough 6 H L C 6 If the testatrix is an intelligent lady the onus of proving that the will is brought about by fraud or undue influence is on the caveator-Nabagopal v Sarala 57 CLJ 71 AIR 1933 Cal 574 (576) 146 IC 414 If the allegation be that the testator was incapable of making a will or that pressure was put upon him it is ordinarily for the person making such allegation to make it out. If the testator vas in a sound state of body and mind the presumption is that he executed the will without coercion or undue influence—lameshwars v Ugreshwars 11 CWN 824 (82b) But where circumstances exist which excite the suspicion of the Court (eg if a party writes or prepares a will under which he takes a benefit) it is for those who propound the will to remove such suspicion and to prove affirmatively that the testator knew and approved of the contents of the document and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence or whatever else they may rely on to displace the case made for proving the will-Tyrrell v Painton [1894] P 151 (157) Barry v Butlin (1838) 2 Moo P C 480 Vellasuamy Sitaraman 8 Rang 179 (PC) AIR 1930 PC 24 (25) 121 IC 230 Sarat Auman v Sakhi Chand 8 Pat 382 (PC) 10 PLT 1 AIR 1929 PC 45 (47) 113 I C 471 Lackho Bibi v Gopi Narain 23 All 472 Lila Sinka v Bijay Pratap 41 CLJ 300 87 IC 534 AIR 1925 Cal 768 (769) Paul v Thompson 13 Bur L T 80 59 I C 535 (537) Persons who attack a will on the ground of undue influence must give positive evidence that such influence was actually exercised It will not be sufficient for them to give mere proof of serious illness and of general intemperance of the testator or to show that there was motive and opportunity for the exercise of undue influence by the persons propounding the will and that some of them had in fact benefited by the will to the exclusion

of other relatives of equal or nearer degree. Circumstances of that character may sometimes suggest suspicion and would certainly lead the Court to scrutinize with special care the evidence of those who propound the will but in order to set it aside there must be clear evidence that the undue influence was in fact exer cised-Bur Singh v Uttam Singh 38 Cal 355 (367) (PC.). Rajrajeswara v hubbusuamy 41 MLJ 474 AIR 1921 Mad 394 68 IC 352 Ganpatrao v Vasantrao 34 Bom L R 1371 A J R 1932 Bom 588 (592) 141 J C 747 Baldeo · Gulab 13 OLJ 293 92 IC 237 Where certain codicils were disputed on the ground of undue influence exercised by the testator's wife over him it was held that in order to invalidate the codicils, there must be evidence to show cocrcion in the special matter of the codicils general assertions of the wife's commanding character and of the husband's weakness would go for little-Sala Mahomed v Dame Janbas 22 Born 17 (28) (PC) If the caveator impugns the will on the ground that it was obtained by the exercise of undue influence excessive persuasion or moral coercion it lies upon him to establish that case The mere fact that the testator has acted foolishly and heartlessly by giving his estate to his wife and excluding his son (with whom he had not been for some time on good terms and for whom he had previously made an adequate provision) would not lead the Coart to presume undue influence on the part of the wife-Motibai v Jamsheljee 26 Bom LR 579 (PC) 29 CWN 45 (50) AIR 1924 PC 28 Mere disinheriting one heir and preference of another who was actively concerned with the management of the estate and business of the testator is not sufficient to establish a case of undue influence over the testator-Leong Hone Leon Ah 7 Rang 720 121 IC 796 AIR 1930 Rang 42 (44)

The mere fact that the testator attempted to revoke the will long after its execution is no evidence that undue influence had been exercised over him at the time of execution of the will See Thakur Ishni Singh v. Thakur Baldeo. 10 Cal. 792 (803) (PC).

When a will is propounded by the chief beneficiary under it who has taken a leading part in giving instructions for its preparation etc. it is necessary that the evidence should clearly prove that the testator approved the will—Sudhir Chandra v. Ultara Sundari 37 C.W.N. 434

62 A will is liable to be revoked or altered by the section 49 maker of it at any time when he is Act X of competent to dispose of his property or altered.

51 Will is revocable—The will of a living person does not come into operation when it has been executed but only upon fus death So long as a testator is living he may at any moment cancel his will and make a totally different disposition of his property. This power he possesses up to the hour of his death provided he is competent then to execute a valid will—Rambhagan v. Gurchaun 27 All 14 (15). If an instrument is on the face of it of a testamen tary character the mere circumstance that the testator calls it irrevocable does not alter its quality. Therefore if in a will there is a statement by the testator that he will not sell the properties absolutely such a restraint upon his own power of alienation would be void and will not make the instrument irrevocable.—Stagore v. Digambar 14 CWN 174 (177) 3 1 C 380 10 CL J 644. If I make any testament and my last will irrevocable yet I may revoke it for my act or my words cannot alter the judgment of the law to make that irrevocable which is of its own nature revocable.—Per Lord Cole in Vinner's case (1610)

ct X of

865

8 Coke 82 (a) Since the testator may at any moment cancel his will no sur (by another person) for cancellation of the will can be during his lifetime-Rambhajan v Gurcharan 27 All 14 (15)

Although a will is always revocable notwithstanding a contract not to revoke it yet such a contract is not illegal and is binding if made for good consideration and in such form as to comply with the statute of Frauds—Hammersley v De Biel 12 Cl & Fin 45 Robinson v Ommanney 23 Ch D 285, and damages are recoverable for the breach thereof (though a contract not to revoke a will cannot be specifically enforced)—Re Parkin [1892] 3 Ch 510, Williams of Executors (11Edn) Vol I p 93

## CHAPTER III

## Of the Execution of unprivileged Wills

Execution of unpriving an expedition or engaged in actual warfare or an airman so employed or engaged or a mariner at sea, shall execute his will according to the following rules—

(a) The testator shall sign or shall affic his mark to the will, or it shall be signed by some other person in his presence and his traderection

person in his presence and by his direction.

(b) The signature or mark of the testator or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will

(c) The will shall be attested by two or morwithesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person and each of the witnesses shall sign the will in the presence of the testator but it shall not be necessary that more than one witness to present at the same time and no particular form or attestation shall be necessary.

This section may be compared with section 9 of the Finalish Wills Art 1857 (1 Vict c 2n)

The words for an airman so employed or engaged have been added by the Re cause and Amending Art N of 1927

52 Scope of Section—This Section has now been made applicable to all wills made by Hindus Buddhasts etc. in all parts of British India after the 1st January 1927 See section 57 clause (c) Formerly a will executed by a Hindu in Bombay Presidency before the 1st January 1927 in respect of im moveable properties situated in the mofusial of that Presidency (ε e outside the jurisdiction of the Hindu Wills Act) was not invalid if it was attested by one witness only Section 50 of the Succession Act 1865 (corresponding to the present section) did not apply to such a will—In τe Bepup I agannath 20 Bom 674 (675) So also in the U P if a will was prepared according to the instructions of the testator but he did not sgn it it was still valid as a will and the deceased was not deemed to have deed intestate An application for succession certificate was therefore refused—Janki v Kallu Mad 31 All 236 (238) These rulings are no longer of any authority in respect of wills executed after 1st January 1927

So also wills could be made orally by Hindux Buddinsts etc before the Ist January 1927 in those places which were not governed by the Hindu Wills Act though very strict proof was necessary as to the time and place at which the bequest was made and as to the words used by the deceased see Bal Bhaddar v Prag Dut! 41 All 492 17 A LJ 765 Morapy v Sr Rama Chandra A IR 1924 Nag 175 76 IC 95 Beer Pertab v Resendra Pratab 12 M IA 9 9 W R (PC) 15 (19) Venkat Rao v Namdeo 58 I A 362 36 C W N 83 (86) (PC) 133 I C 711 A IR 1931 P C 285 Narmyan v Deet Dass 1917 P LR 41 35 IC 899 T Jlak Nath v Jagamath 1911 P LR 240 12 I C 51 Kumaraswemia v Varataranth 23 I C I 4 Naran v Govundo 1918 P LR 83 45 I C 183 So also a will made by a Hindu before the 1st January 1927 in a mofussal place in the Madras Prestdency was valid even if it was unattested—Ratans v Administrator General 52 Mad 160 55 M LJ 478 A IR 1928 Mad 1279 (1281) But as a result of the enactment of the new sec 57 all wills executed on or after the 1st January 1927 must be reduced to writing and attested

This section merely lays down the formalities required by law to be observed in the execution and attestation of a will and must not be confused with the question of the proof (under sec 68 Evidence Act) of the fact whether those formalities have been properly observed. This section requires that the will must be attested by two witnesses whereas under sec 68 Evidence Act it is quite clear that a will can be proved by one of the attesting witnesses. It would therefore be a mistake to hold that because the will has not been proved by two attesting witnesses the will cannot be admitted to probate—Rammol Das v Habol 22 CWN 315 (316) 43 IC 208

The provisions of this section apply to a will executed by a Tallikdar under the Outh Estates Act (I of 1869) even though at the time of making the will the Tallikdar's name was not approved and published in the Gazette under sec 9 of that Act but was merely included in the lists prepared under sec 8—Dulahin Jadunalh N Bisheshar 8 OWN 258 (PC) AIR 1931 PC 24 (26) 130 IC 306

53 Clause (a)—Signature of testator—The use of pen and ink is not necessary for signing—feakurs or Gaisford (1863) 11 WR (Eng) 854 3 Sw & Tr 93 A stamped name is therefore sufficient. Thus where in the testator is presence and by his direction another person stamped the will by way of signature with an instrument in which the testator had his usual signature engraved so that it might be stamped on letters or other documents requiring his signature this was held to be a due execution of the will—Ibid. So also where a testator who for a number of years being unable to write on account.

of paralysis was in the habit of using a name stamp which used to be attached by a servant to any document or paper which he wanted to sign executed a will and in his presence and under his direction a servant affired the impression of his name stamp on the will held that the will was duly signed within the meaning of this section—Numal v Saratmom 25 Cal 911 (916) Similarly where a testator affixed to a will a seal stamped with his initials and placing his figer on the impression made by the seal said this is my hand and seal held that there was sufficient execution—In the goods of Emission 9 LR Ir 443 A person may sign or put his name down by means of types or if he uses a facismile far signing his name he may use it for his signature—Nirmal v Saratmoni signa.

Where a will is written on several sheets of paper but the testator has signed only one sheet the will is not thereby rendered invalid. It is well settled that one signature made with the intention of authenticating the whole instrument is sufficient though the will be contained in several sheets of paper. No doubt, as a precaution against possible substitution each sheet may be initialled by the testator or by the witnesses but this is not essential and it will generally be presumed that all the sheets were put together in the same order at the time of execution as at the testator's death-Sagore Chandra v Digambar 14 CWA 174 (178) 10 CLJ 644 3 IC 380 Jarman on Wills (5th Edn.) Vol. I p 80 Redfield on Wills (4th Edn.) Vol I p 208 When a will is found written on several sheets of paper one of which only is signed and attested prima face the presumption is that they were all in the room and formed part of the will at the time of execution-Marsh v Marsh (1860) 1 Sw & Tr 528 Gregory v Queens Proctor (1846) 4 Notes of Cas 620 (629) Rees v Rees LR 3 P & D 84 Leuis V Lewis [1908] P 1 Bond V Seawell (1765) 3 Bur 1773 If a will consists of five sheets of paper of which the first two sheets are written in a different ink and with a different pen from what have been used in the other three sheets and the signatures of the testator and the attesting witnesses are contained in the fifth sheet this does not make the will invalid if the reason for using the different pens and inks is satisfactorily explained (eg where the evidence indicates that the writing of the will was begun in the outer apartments of the residence of the testator and was finished and attested in a shop in the neighbouring market where the intending witnesses had gone to make their purchases)-Sagore Chandra v Digambar supra

Initials of the testator operate as a signature—Sher Mahomed v Dy Commissioner 7 OLJ 406 58 1C 134 (139)

The testator's gned five blank papers with a view to having his testamental intentions written over the e signatures a draft will having already been prepared under his instructions. The will was then fair copied over those signatures on the five sheets as well as on two more sheets and was read out to the testator and he then signed the last two sheets. Held that the will was validly executed it was not invalid merely because the testator signed some of the earlier shelfs before the will was written on them—Alagappa v Mangathai 40 Mad 672 (67a) 30 M.L.J. 504 34 I.C. 768.

54 Mark —Under sec 3 (52) of the General Clauses Act the nord sign shall denote mark only in case of a person who is unable to write his name that under the present section the testator can execute his will either by sgrind it or by affixing his mark is the can affix his mark without reference to the question whether he can write or not Therefore the fact that a person who can sign his name merely makes a thumb mark does not affect the validity of the will but the evidence with regard to the making of the mark will have to be scrutinized with great care—Gulabhkan v 1 mins 28 Boml R 529 90 IC 1to

AIR 1926 Bom 355 (356) In England also the making of a mark by the testator is a sufficient signing to satisfy the statute whether he can write at the time or not—Paker v Dening 8 A & E 94

Where a will was not signed but marked with the Bengali letter 7' signifying manizor or confirmed it was held to be a good signing—Rajendra v Jagendra 14 MIA 67 (83)

A thumb mark would be a sufficient signature—Theresa v Francis 45 Bom 989 (993)

Execution by putting of mark—Hand guided by another—
It has been held by McNair J in In the goods of Annual Ja Kumar Bose 42
CWN 649 that if a testator in maling his mark upon the will to execute the same, is assisted by some other person who guides his hand and he acquiesces and adopts it it is just the same as if he had made it without any assistance His Lordship observed in the judgment of the case as i follows—

It is argued on behalf of the defendant that it cannot be said that the testator signed or affixed his mark nor it is argued is there evidence that it was signed by some other person in the testator's presence and by his direction Reliance is placed on the well known case of Parker v Felgate LR 8 PD 171 (1883) That case was cited with approval by Lord Machaghten in Perera v Perera (1901) AC 354 In Parker v Felgate LR 8 PD 171 (1883) the facts are somewhat similar to the facts now before me and it is also suggested that certain incidents have been introduced into the present case to ensure a similar finding in favour of the validity of the will. There the deceased gave instructions for her will to her solicitor and it was drafted and engrossed. She was suffering from Bright's disease and eventually coma set in which went on increasing but still she could be roused and answered general questions by making signs in response. When her will was going to be executed the doctor rustled it in front of her face and thus roused her and said your will Do you wish this lady (Mrs Flack) to sign it? and she replied ves and the doctor's evidence was that as far as he could judge she under stood what she did Sir James Hannen summed up to the jury and left them three questions. The first was. Did the deceased when the will was executed remember and understand the instructions she had given to Mr Parker the solicitor? The answer was No The second question was- Could she if it had been thought advisable to rouse her have understood each clause if it had been put to her? Again the answer was- No The third question was-Was she capable of understanding and did she understand that she was engaged

Was she capable of understanding and did she understand that she was engaged in executing the will for which she had given instructions to Mr Parker? In was answered in the affirmative and the Court pronounced for the will

The question whether this was or was not the testator's signature raises some difficulty. But I have been referred to the case of \*\*Usion\*\* v \*Beddard\*\* 12 Simon s Rep 28 (1841) There the testator signed his will not with his name but with his mark and in doing o his hand was guided. The Vice-Chancellor sign at p 33 of the report

The Judge said that it was necessary that the Will should be signed by the testator not with his name for his mark was sufficient if made by his hand though that hand might be guided by another person and in my openion that proposition is correct in point of law. For the Statute of Frauds requires that a Will should be signed by the testator or by some other person in his presence and by his direction and I wish to know if a dumb man who could not write were to hold out his hand for some person to guide it and were then to make his mark whether that would not be a sufficient signature of his

Will In order to constitute a direction it is not necessary that anything should be said. If a testator in making his mark is assisted by some other purson, and acquiesces and adopts it it is just the same as if he had made it without any assistance.

In the case of Muktanath Roy Choudhury v Jitendia Nath Roy Choudhury 19 CWN 1205 (1915) the Court found that the Will was executed by the testatrix as required by sec 50 of the Succession Act. The evidence wa that a person named Shibendra guided the hand of the testatrix in fixing his mark and also put down the name of the testatrix under the mark by his own per. His evidence was I think her finger mark was taken by catching hold of he finger and it was contended that this could not be taken as execution of the document by the testatrix because the motive power was that of Shibendra, and that there was no evidence that this was done in accordance with the direction of the testatrix. The Court found that if her finger was guided to make the mark and she did not snatch away her finger or oppose the finger mark being made on the document it cannot be said that the finger mark was made against her will.

If a testator in making his mark upon the will to execute the same is assited by some other person who guides his hand and he acquisses and adopts it it is just the same as if he had made it without any assistance—In the goods of Amilya Kumar Bose 42 CWN 648

"It shall be signed by some other person in his presence and by his direction" —The principle is that according to the proper con struction of the words it shall be signed by some other person in his presence and by his direction in sec 63 (a) the proper form of such signature is and has always been recognised to be for the other person to sign the name of the testator and not his own It is no doubt usual to add that the testators signature wat made by the person in his presence and by his direction and then for the other person to sign But this a matter of furnishing brima facie evidence that the signature by the other person is as it should be in order to be valid according to the section affixed in the presence of the testator and by his direction and does not form an integral part of the signature itself. The evidence of presence and authority might be given otherwise than by such an addition to the signature it is no doubt usual and regular to avoid disputes that the other person should add when signing the testator's name that he does so according to the section The absence of such an addition however does not invalidate the signature of the testator's name if in fact it was made as the law requires in the presence of and by the direction of the testator Where the signature in a will contained the words This scratch—the mark of so and so it was held that the will was valid) executed—Dasureddi v Venkatasubbanal 57 Mad 979 The some other person referred to in this section must sign and is not competent to put the mark of the testator A mark is a mere symbol and does not convey any idea to a person nho makes or notices it The Legislature provides that so far as the testator is concerned if he is literate he may sign his name which would convey a distinct idea regarding the execution of the document or if he is illiterate he may affix his mark as an indication of his act as executant of the will In the case of somebody else writing for him the section requires that he should write the name or put it in such a manner as would lead anybody else to see at once who the person was who executed the document—Numal Chunder v Saratmont 25 Cal 911 (916) If the testator who cannot sign his name merely touches a pen and hands it to some one to affix his mark the will is not validly executed. The mark should be affixed by the testator himself—Radhakrishna v Subraya 40 Mad 550 (554) This section is sufficiently complied with if the mark is affixed by the testalor

himself though with the assistance of another person who guides the finger of the testator on the document—Mikkā Nath V Intendra 19 CWN 1295 (1295) 27 I C 677 The impressing of a name stamp of the testator on the will by his seriant does not amount to making a mark but amounts to signing by another person and is valid—Numal v Saratimoni supra But in Theresa v Francis 45 Bom 989 (992) Macleod CJ held that a mark made by some person at the direction of the testator was a valid execution of the will

It is not necessary that the person agains for the testator must sign in the name of the testator if he sign in his own name such signature is sufficient—

In the goods of Clark 2 Curt 329

Under the English law the signature of the testator may be made by any of the attesting witnessee—In the goods of Basiley 1 Curt 914 Smith v Harris 1 Robert 262 But in Indian law the words some other person have been interpreted to mean not only some person other than the testator but also some person other than the attesting witnesses Therefore a person signing for the testator cannot be an attesting witness—4xaba v Pestony 11 BHCR 87 (distinguishing the above two English cases) Radiakurishina v Subraya 40 Mad 550 (555) 34 IC 849 Therefore where the testator does not himself sign but some other person signs in his presence and by his direction then besides this other person who has so signed at the request of the testator there must be two more witnesses who should sign the will in the presence of the testator—In 1st Hemilea 9 Cal 226 (229) Radharishina v Subraya supra-

If the finger of the testator is guided by some other person S and the former document it amounts to sagning by the testator himself. Even if S then writes down the name of the testator beneath the mark still it cannot be said that the document has been executed by S on behalf of the testator. The execution was complete when the mark was made by the testator and S was not therefore incompetent to be an attesting witness—Mukta Nath v Jitendra 19 CWN 1296 (1298 1297) 27 IC 677

56 Clause (b)—Place of signature. —A will is not rendered invalid by the circumstance that the signature is placed among the words of the testi monial clause or of the clause of attestation if the Court is satisfied that the deceased intended by signing his name in the attestation clause to execute his will—In the goods of Walter 2 Sw & Tr. 384 In the goods of Caminer L R 1 P & D 653 In the goods of Hucktale L R 1 P & D 375, In the goods of Peam 1 P D 70 A will made by one Robert Porthouse was on a printed form imperfectly filled in in which he had omitted to insert his name and description at the head of the document and to append his signature thereto but he had written his name in the attestation clause ( In witness whereof I the said Robert Porthouse have to this my last will set my hand etc.) Hidd that this was sufficient signature as the deceased intended by signing his name in the attestation clause to execute the will—In the goods of Porthouser 23 Cal 764 (786)

It does not matter in what part of the will the testator signs. In the case of vernacular wills in this country, the prevailing custom is to put the signature on the top of the document in its righthand corner. This is valid execution in India. The English system of signing the document at the end does not obtain jusually among Indians—Saurin F 4 Sauri 19 CWN 1297 (1301) 29 IC 743.

57 Clause (c)—Attestation—The execution of a will includes the testators signature and the attestation by witnesses and so long as there is no attestation the will cannot be said to have been duly executed. Thus if a will was signed in 1877 and attested by witnesses in 1887, it is said to be executed.

in 1887 and until then it was not complete and valid as a will—Mir Syed Hasan v Taijaba 1 OLJ 591 26 IC 547 (589)

It is not necessary that attestation by witnesses should take place as son as the will is signed by the testator. Thus the testator signed a will in 1887 but it was not then attested by any witnesses. He deposited it in a sealed one at the office of the Sub Registrar. More than 9 years later he went to the Sub Registrar so office took out the will from the sealed cover, and formally presented it to the Sub Registrar for registration as a will and admitted its execution in the presence of three witnesses and these witnesses as well as the testator proceeded to sign the document at the back below the registration endorsement. Held that these proceedings amounted to an attestation of the will sufficient to satisfy the requirements of this section—Mir Syed Hasan \( Ta) ba \( 1 \) OLJ 591 26 IC 547 (588 589) Mohammad Hasan \( \) All Hadit 28 OC 8 12 OLJ 1 AIR 1925 Oudh 337 (344)

From these cases it is evident that it is not necessary that the attestation.

Jhould take place at the house of the testator or at the place where the will is executed. The witnesses at the Sub Registrar's office would be attesting witnesse if the acknowledgment of signature was made by the testator in their presence and they signed in the presence of the testator at the same time or separately—Mohammod Hasan v. All Hander 28 OC 8 1 OWN 803 85 IC 509 AIR. 1925 Outh 337 (346)

A person who signs the will on behalf of the testator (who is illiterate) annot also sign as an attesting witness—Radhakrishna v Subraya 40 Mad 550 (556) 34 IC 849

It is not required that the attesting witnesses should be persons of the same social position as the testator. See Dulhini Chandra v Harnandam 20 CWN. 1617 (PC) 33 IC 790 If a will of a gentleman of a very high social position is attested by persons who are his dependants or servants it may be a reasonable ground for su pictor that the will is not the voluntary act of the testator but has been procured by the undue influence of members of his household if there are other circumstances his ely to excite suspicion and there is no explanation as to why the testator could not secure the attendance of persons of a higher rank but where the circumstances attending the execution of the will are not at all suspicious and the will does not contain any discrepancies or other features calculated to suggest doubts as to its genuineness the mere fact that the will of a gentleman of high rank feg Raja) was attested by his dependants or by persons who were in his service would not make the will invalid—Choley Aran V Ratan Aper 22 Cal 519 (531 532) (PC)

This section requires that the attesting witnesses must either—(1) see the testator s gn or affix his mark or see some other person sign the will or (2) receive from the testator a personal acknowledgment of his signature or mark of of the signature of such other person. If these facts are not proved the will cannot be said to have been validly attested—Umakanta v Bisuembhar 8 Pal. 419 117 IC 874 A IR 1929 Pat 401 (402)

Witnesses shall see the testator sign —It is sufficient for a valid attestation of a will that the sutnesses were in the ame room with the testator and had a clear view of the testator when he was in the act-of signing it is not necessify for the witnesses to actually ee the fingers of the testator move as the signature is made—Sher Mahomed v Deputy Commissioner S8 IC 134 (139) 7 OLJ 400; Actila V Manager S8 IC 915 (931) (Oudh) But where a testaturi signed her will in a shop and one witness who saw her sign attested it but the other witness being at the time when the testaturi and the first witness signed engaged at the other side of the shop with a person who stood between him and the

testatrix did not see them sign and did not know nor had the opportunity of knowing anything about the will until after they had signed when he was asked to be a witness it was held that the attestation by the second witness was not a valid attestation—Brown v Skiriew (1902) PD 3 But see Newton v Clarke 2 Curt. 320 cited in Note 61

58 Acknowledgment of signature —An acknowledgment of execution by the testator and attestation of the will in his presence is a sufficient values attestation under the third clause of this section—Ameer Chand v Mohanund 6 CL J 453

Whether the signature be made by the testator or by some other person on this behalf if it be acknowledged by the testator in the presence of the two winesses the execution shall be good. This section does not mean that the acknowledgment of the signature is intended to be effectual only where the signature has been made by some other person at the direction of the testator.—In the goods of Regan 1 Curt 908. Where it is proved that the testator duly acknowledged a signature to the attesting witnesses it has been considered sufficient prima facie without proving that the signature was in this indirection—Gale v Gale 3 Curt 458.

It is not necessary that all the attesting witnesses must prove the same state of things ie this section does not require that all the witnesses must see the testator sign or that all the witnesses. Thus freceive from the testator a personal acknowledgment of his signature. There may be cases in which one witness saw the testator sign and another witness did not actually see the cestator sign but his signature was acknowledged before him. It is sufficient if each of the witnesse conforms to one of the alternatures. This is also evident from the fact that this section does not require that all the witnesses must be present at the same time—Muktanath v Jitendra 18 CWN 1255 (1297) 27 IC 677

It was held to be a sufficient acknowledgment by the testator of his signature to the will if he made the attesting witnesses understand that the paper which they attested was his will even though the witnesses did not see him sign it or even did not observe any signature on the paper which they attested provided that the Court was satisfied that the testator's signature was on the will when they attested it-Amarendra v hashi Nath 27 Cal 169 (171) Balmukund v Bhazu andas 15 Bom LR 209 19 IC 401 Manickbai v Hormasji 1 Bom 547 This view was founded upon the opinion expressed in certain English cases Smith v Smith 1 P & D 143, Cooper v Beckett 3 Curt 659 (affirmed 4 Moo PC 419); Guillim \ Guillim 3 Sw & Tr 200 Beckett v Howe LR 2 P & D 1 But it is now the settled law in England that to constitute a sufficient acknow ledgment the witnesses must at the time of the acknowledgment see the signature of the testator or have the opportunity of seeing it, and if such be not the case it is immaterial whether the signature be in fact at the time of attestation or whether the testator say that the paper to be attested is his will or that his signature is inside the paper .- Blake v Blake 7 PD 102 Wright v Sanderson 9 PD 149 Daintree v Fasulo 13 PD 67 (102)

The acknowledgment by the testator of his signature may be express or implied. It is not necessary that he should state to the witnesses that it is his signature. In the testator produces his will with his signature visibly apparent on it, to the witnesses and requests them to subscribe it this is a sufficient acknowledgment of his signature—This v' Geng 3 Curt '172' (179) Blake V' Kright. 3 Curt 563 (564) In the goods of Thomson 4 Notes of Cas 643 Leech v Bates 6 Notes of Cas 704 A personal acknowledgment of execution need not necessarily be restricted to an express statement to that effect, but may include

words or conduct or both on the part of the testator which may be construed unequivocally as such an acknowledgment—Ganshamdass v Gulab 50 Mad 97 (per Curgenven J) AIR 1927 Mad 1064 (1065) 106 IC 150 It seems fairly clear that if a testator asks a person to attest a will it can be quite leg timately inferred that he admitted that the will was executed by him and that he person whom he wanted to attest had to attest the will in token of his admission of execution—Ganshamdoss v Sarasswati Bai 21 LW 415 AIR 1925 Mad 861 (867) 87 IC 621

The attestation of a signature implies that the signature of the testator must be on the will at the time of attestat on. It is not sufficient merely to produce the paper to the witnesses where it does not appear that the signature of the testator was affixed to it at the time—Illot v Genge 3 Curt 160. Evidence is admissible as to whether the signature of the testator was on the vill at the time of attestation. But sometimes it happens that no evidence is forthcomm in such cases the Court is at liberty to judge from the circumstances of the case whether it was probable that the name of the testator was on the will at the time of attestation—In the goods of Huckiele LR 1 P & D 375. In the goods of Pearn 1 P D 70.

A will was attested by five witnesses. One witness was called in Court and the deposed that the testator had acknowledged his signature before him and he attested the will. Another witness was not called in Court but his signature was proved. The three remaining witnesses were dead. Hidd that from the circumstance of the case it must be inferred that the testator had acknowledge his signature before the four other witnesses also. The will must be deemed to have been duly attested and probate must be granted—Sibosundari v Hemanim 4 C.W.N. 204 (2007).

There is a presumption of due execution where there is a proper attestation clause even though the witnesses have no recollection of having vintessed the will Halsbury's Laws of England Vol 18 p 555 If a will appears on the face of it to have been executed and attested in accordance with the requirements of this Act the maxim omnus procsumunitur rite essa acta applies unless it be clearly proved by the attesting witness that the will was not in fact duly execute —Jarman on Wills (6th Edn.) p 105 Woolmer v Mrs. Daly 1 Lah 173 (17)

Attestation by Registrar - If on admission by a testatrix of her signature on the will before the Registrar and on her identification before the Registrar by one of the atte ting witnesses both the Registrar and the identity fying witnesses sign their names as witnesses to the admission it would be a sufficient attestation under this section—Hurro Sundan v Chunder Kart 6 Cal 17 In the goods of Roymoney 1 Cal 150 Nutse Gopal v Nagendra 11 Cal 429 Amarendra v Kashi Nath 27 Cal 169 (171) Horendra Chandra Kanl 16 Cal 19 (23) see also Mir Syed Hasan v Tanyaba 1 OLJ 591 26 IC 547 (588) Where the testator (an illiterate person) affixes his thumb mark on his will before the Sub Registrar and the identifier who is one of the attesting witnesses, and then both the Sub Registrar and the identifier sign their names (the Sub-Registrar signs the endorsement about the testator's admitting that the will i his, and the identifier signs the endorsement of the testator's identity before the Sub Registrar) the will is held to be sufficiently executed and attested Sub Registrar must be treated as an attesting witness to the will for he has not only seen the testator affix his thumb-mark to it but has also received from the testator a personal acknowledgment that the will is his-Theresa v Francis 15 Born. 989 (994) 23 Born.L.R 399 A I R 1921 Born. 156 61 I C. 587

These cases show that a will is validly executed if it is attested by one

attesting witness only provided it is registered during the lifetime of the testator the Sub Registrar being treated as another attesting witness. This was what actually happened in a Patna case. The testatrix affixed her mark to the will and there was only one attesting witness. The next day the Sub Registrar came to her house to register the will and she was identified before him by the scribe and then the Sub Registrar signed an endorsement stating that the testatrix admitted execution of the document. Held that the Sub Registrar being taken as an attesting witness the will was properly attested by two witnesses and the requirements of the law were satisfied—Sarqual Prisad v Triguna Charon. 1 Pat. 300 (305) A IR 1922 Pat. 402 70 IC 402

À will executed by B contained the signature of N who signed as a scribe on the face of it the will did not purport to bear the signature of any attesting wit ness. The testator after executing the will put it in a sealed cover and deposited it with the Registrar under see 42. Registration Act. On the cover there was an endorsement containing a description of the will and signed by B and below this signature there was an endorsement written by the Sub Registrar but not signed by him and there was also a signature of H a pleader who identified B before the Sub Registrar. It was held that the will was not validly attested by two witnesses. The endorsement on the cover by the Sub Registrar was not signed by him consequently the Sub Registrar was not signed by him consequently the Sub Registrar was not an attesting witness and the cover could hardly be said to be a part of the will. The pleader H signed as an identifier and not as an attesting witness further N signed as a scribe and not as attestor. Even if H be taken as a witness still the will was not attested by two witnesses and was therefore invalid—Umakanta v Bistuambhar 8 Pat 419 117 IC 474 Al RI 1829 Pat 401 (403)

60 'Witnesses shall sign' —In England it has been held that as in the case of the testator so in the case of the attesting winnesses a subscription by mark is sufficient notwithstanding that the wintess is able to write. See Williams on Executors (11th Edn.) Vol. 1 p. 69. But in Indian law a marked distinction is drawn in the present section between the required action of the testator and that of the attesting witnesses. The former may sign or affix his mark but the attesting wintesses must sign the will and we must conclude that a signature is intended as opposed to a mere mark affixed —per Melville J in Fernandez v Aloes 3 Bom. 382 Nitye Gopal v Nagendra 11. Cal. 429 (432 433) Venkatamanays a Nagenman 35 LW 233 136 IC 343 AIR 1932. Mad 272 (274) It is not a sufficient compliance with this section if the wit nesses only affix their marks—Ammage ev Velumabas 15 Mad 261 (264).

The initials of witnesses may constitute a sufficient attestation—In the goods of Christian 2 Robert 110 In the goods of Blewitt 5 PD 116 Ammayee v Yelumabar 15 Mad 261

one, witness cannot sign for or in the name of another witness—In the goods of White 2 Notes of Cas 461 In the goods of Levenigion 11 PD 80 But where a will was attested by one witness in his own handwriting and he also held and guided the hand of a second witness who could not read or write and in this way the second writness s name was written as an attesting witness this was held to be a sufficient attestation—Harrison v Elmi 3 QB 117

Attestation by sealing is not valid-In the goods of Byrd 3 Curt. 117

It does not matter in what part of the will the attesting witnesses sign their names, provided it appears that the signatures were meant to attest the requisite signature of the testator—In the goods of Daws 3 Cfbt 748 In the goods of Chamney 1 Robert 757 II a will is written on different sheets of paper and each of the three witnesses subscribe on a different sheet, it is a good subscription.

Where it appears that a will is within the statute-Lea v Libb Carth 37 wholly in the handwriting of the deceased testator and bears his signatures on the various pages thereof and alongside his signature on the righthand corner of the first page are the signatures of the four witnesses and on each of the other three pages the signatures of two out of those four persons held that the signature of the testator on the first page was the operative signature by which he intended to make the document an effective one and that the witnesses put their signa tures animo attestands and the will was properly executed by the deceased-Savitri v F A Sain 19 CWN 1297 (1301) 29 I C 743 But in England the signature of the testator on the last page is the operative signature therefore in a will written on several sheets if the last page alone is attested the whole will is well attested provided the whole will be in the room and although a part may not have been seen by the witnesses-Bond v Scawell 3 Burr 1773 Gregory v Quee 1 s Proctor 4 Notes of Cas. 620 Marsh v Marsh 1 Sw & Tr 578 In the goods of Fullet (1892) P 377, Lewis v Leuis (1908) P 1

A will is not entitled to probate unless the Court is satisfied that the names of the alleged witnesses were subscribed on it for the purpose of attempt the testators signature—In the goods of Wilson LR 1 P & D 259 In the goods of Braddock 1 PD 433 In the goods of Sharman LR 1 P & D 651 Griffiths v Griffiths LR 2 P & D 300 In the goods of Streatley [1891] P 17

This section does not in so many words prescribe the order in which the signatures of the testator and the attesting witnesses are to be affixed but it is to be implied from the language used and from the order in which the rules for execution are laid down that the legislature intended that the two attesting witnesses should have seen the testator sign before they affixed their own signatures—Bissonath v Dayaram 5 Cal 738 (739) The two attesting witnesses shall sign their names after the testator shall have signed his name—Histor Sundan V Chunder Kont 6 Cal 17 (18) Fernandes v Alves 3 Bom 332 Therefore there is no valid attestation if the signature of the testator is not on the will at the time of attestation—Histor V Genge 3 Curt 160 (181)

"In the presence of the testator" -The provision of the law requiring that the witnesses shall sign the will in the presence of the testator does not imply that the testator should actually see the witnesses sign it is sufficient if he might have seen them if he chose to look—Shires v Glasscotk Salk 688 Day v Smith 3 Salk 395 Therefore where a will was executed by the testatrix in her carriage and the witnesses subscribed in the attorney's office opposite to the window where the carriage was so that she might have seen them through the window while they were subscribing it was held that the attestation was valid—Casson v Dade 1 Bro C C 99 Similarly if the testator is blind the statute is satisfied if the position of the testator was such that he could have seen the witnesses if he had his eyesight unimpaired. Re Pieret) 1 Robert, 278 So also where the testator signed his will while lying in his bed and there were two attesting witnesses one of whom the testator could see and could be seen by him and other witness was so placed behind a curtain that neither could be see nor could be seen by the testator it was still held that both witnesses were sufficiently in the presence of the testator to make their attestation valid-Neuton v Clarke 2 Curt 320 But where the witnesses signed in an adjoining room to that in which the testator was and the door between them was open but he was not in such position that he could see them held that there was no proper attestation—Doe v Manifold 1 M & S 249 Where the testatrix lay in her bed with the curtains closed and her back to the attestics witnesses when they subscribed and it appeared that by reason of her sta e

of extreme weakness, she could not by any possibility have turned herself into a position in which she could have seen the witnesses sign even if the curtains had not been closed hild that the requirements of law were not complied with—Tribe v Tribe 1 Robert 775

The testatrix (a pardanashin lady) went to the Registrar's office and sat behind one fold of a door which was closed the other fold being open and the Registrar and another person who identified the testatrix were in the veranda into which the door opened. The testatrix's admission of execution of the will was endorsed on the will and witnessed by the Registrar and the person who identified her Held that the witnesses (ie the identifier and the Registrar) were in the presence of the testatrix for the purposes of this section because their position was such that the testatrix could have seen them had the other fold of the door been open-Horendra v Chandra Kanta 16 Cal 19 (24 25) But where at the time of signing the will the testator and the witnesses were in different rooms and there was no evidence to the effect that the two rooms were so attuated or that the testator and the witness occupied such a position in relation to each other that the one could be said to be in actual visual presence of the other while each was signing the document it was held that it could not be said that the testator and the witnesses signed in the presence of one another-Mary Akhbar Mer a v Sangster 3 Luck 482 112 IC 13 AIR 1928 Oudh 258 (259) See also Brown v Skirrow [1902] P 3 cited in Note 57

To constitute presence the testator should be mentally capable of recog many the act which is being performed before him mere corporal presence is not enough—Jarman on Wills (5th Edn ) Vol I p 89 Therefore if a testator after having signed his will and before the witnesses subscribed their names fell into a state of insensibility the attestation was insufficient—Right v Price Doug 241

Witnesses need not be present at the same time -The English law requires that both the witnesses must be present at the same time and both must see the testator execute the document as his will. But the Indian law expressly lays down in clause (c) of this section that it shall not be necessary that more than one witness be present at the same time -Savitri v F A Sain 19 CWN 1297 (1301) 29 I C. 743 Muklanath v Jilendra 19 CWN 1295 (1297) 27 I C 677 Therefore where the testator after having executed his will in the presence of one attesting witness took it successively to the houses of two other attesting witnesses who on hi acknowledgment of his signature attested the document it was held that there was valid attestation by all the three witnesses-Savilra v F A Sain supra. And since the vitnesses need not be present at the same time it is not necessary that all the witnesses must see the testator sign or that all the witnes es must receive from the testator an acknowledgment of his signa ture It may as well happen that one witness may see the executor sign and the other witness may not see him sign but the testator may acknowledge his signature before him. It is sufficient if each of the witnesses conforms to one of the alternatives-Mukta Nath v Jstendra supra Savitrs v F A Sain supra Ghanshamdoss v Sarasu athibas 21 LW 415 AIR. 1925 Mad 861 (867 868) 87 I C 621

62 No form of attestation necessary —No particular form of attestation shall be necessary. It is therefore sufficient if the witnesses without any attestation clause of any description merely subscribe their names—Bryan v. Witte. 2. Robert. 315.

63 Mi\_cellaneous — It is immaterial in what language a will is written whether in Latin French or any other language—Swinburne Part 4 s 25, pl 4

51

So in India it does not matter whether the testator writes in his mother language or in English or in Sanskrit

A will may be made in pencil or in ink-Rymes v Clarkson 1 Phillim 30

There is no provision of law that the will shall be written continuously Therefore if a will is otherwise duly executed it is no objection that it contains blank spaces in the body of it—Corneby v Gibbons 6 Notes of Cas 679 Pandu rang v Vinayak 16 Bom, 652 (655)

A will may be written on any sub tance even on a palm leaf as in Valis najagam v Pachche 1 MHCR 326

Incorporation of papers by reference part of his intentions, such document the part of his intentions, such document it is referred to

64 This section applies to Hindus Buddhists etc. see sec 57 and Sch.

If a testator in a will or codicil or other testamentary paper duly exemite refers to an existing unattested will or other paper the instrument so referred to becomes part of the will—Haberpany V Fincent 2 Ves 228 Utilita V. Robins 1 A & E 423 Doe v Evans 1 Cr. & M 42 The intention to more ported must be clear and the document referred to should be of a testamentary character—In the goods of Hubbard LR 1 P & D 53 Thus where a deed the purpoe of making its contents part of the will it was held that it was not a testamentary document although the will in terms purported to confirm the deed It did not therefore come within this section—Bas Gunge Bar & Buy unn Das 29 Bom 530 (564) (PC) Where a will refers to a paper such paper cannot be incorporated with the will unless it be clearly identified mit the description of it given in the will and be shown to have been in existence in the time the will was executed—Sungleton v Tominson 3 App Cas. 49 Withinson v Adam 1 Ves R 485

## CHAPTER IV

# Or privileged Wills

Privileged wills.

Provided wills.

engaged in actual warfare, or an armariner being at sea, may, it he has completed the rige of eighteen years, dispose of his property by a will made in the manner provided in section 66. Such wills are called

#### Illustrations

(1) A a medical officer attached to a regiment is actually employed in an expedition. He is a soldier actually employed in an expedition and can make a privileged will

(11) A is at sea in a merchant ship of which he is the purser. He is a

(ii) A is at sea in a merciant supp of which he is the purser fre is a manner and being at sea can make a provileged will (iii) A a soldier serving in the field against insurgents is a soldier engaged in actual warfare and as such can make a privileged will (iv) A a manner of a ship in the course of a vojage is temporarily on shore while she is lying in harbour. He is for the purposes of this section a manner at sea and can make a privileged will (iv) A or a significally become and a parall force, but who lying on shore and

(v) A an admiral who commands a naval force but who lives on shore and only occasionally goes on hoard his ship is not considered as at sea and cannot

make a privileged will (vs) A a manner serving on a military expedition but not being at sea is considered as a soldier and can make a privileged will

Note -This section is inapplicable to Hindus Buddhists etc

The words or an airman so employed or engaged have been added by the Repealing and Amending Act X of 1927

- 66 (1) Privileged wills may be Section 53 Act X of Mode of making and (1) Privileged Wills may be Act, rules for executing privi in writing, or may be made by word 1865 leged wills of mouth
- (2) The execution of privileged wills shall be governed by the following rules -
  - (a) The will may be written wholly by the testator, with his own hand In such case it need not be signed or attested
  - (b) It may be written wholly or in part by another person, and signed by the testator In such case it need not be attested
  - (c) If the instrument purporting to be a will is written wholly or in part by another person and is not signed by the testator, it shall be deemed to be his will, if it is shown that it was written by the testator's directions or that he recognised it as his will
  - (d) If it appears on the face of the instrument that the execution of it in the manner intended by the testator was not completed, the instrument shall not, by reason of that circumstance, be invalid, provided that his non execution of it can be reasonably ascribed to some cause other than the abandonment of the testamentary intentions expressed in the instrument
  - (c) If the soldier, an man or mariner has written instructions for the preparation of his will, but has died before it could be prepared and

n 54

of

executed, such instructions shall be considered to constitute his will

- (f) If the soldier, an man or mariner has, in the presence of two witnesses, given verbal instructions for the preparation of his will, and they have been reduced into writing in his lifetime, but he has died before the instrument could be prepared and executed, such instructions shall be considered to constitute his will, although they may not have been reduced into writing in his presence, nor read over to him.
- (g) The soldier, an man or mariner may make a will by word of mouth by declaring his intentions before two witnesses present at the same time
- (h) A will made by word of mouth shall be null at the expiration of one month after the testator, being still alive, has ceased to be entitled to make a privileged will

This section does not apply to Hindus Buddhists etc
The word airman has been added in clauses (e) (f) and (g) by the
Repealing and Amending Act X of 1927

## CHAPTER V

Of the Attestation, Revocation, Alteration and Revival of Wills

67 A will shall not be deemed to be insufficiently attested by reason of any benefit there

Effect of gift to attest
ing witness

by green either by way of bequest or by
way of appointment to any person
attesting it, or to his or her wife or husband, but the bequest
so attesting, or the wife or husband of such person, or any

person claiming under either of them

Explanation —A legatee under a will does not lose his
legacy by attesting a codicil which confirms the will

65 This section does not apply to Hindus Buddhusts etc Therefort a legatee under a will of a Hindu does not lose his legacy by attesting the wil. Under this section a bequest made to an attesting witness or to his wife by a will is void though the attestation of the witness is not indispensible to

the validity of the will and there may be a sufficient number of attesting witnesses without him—Administrator General v La ar Stephen 4 Mad 244 (245) Doe v Mille 1 Mood & Rob 288

Where a will has been executed in the presence of two winesses and the signature of a third person who is a legatee also appears at the foot of the will the Court will take evidence to explain as to why such signature was written and if it is satisfied that it was not written with the intention of altesting the signature of the testator the legatee signature will be omitted from the probate and such legacy will be valid—In the goods of Sharman LR 1 P & D 661

This section has been made applicable to the wills and codicils of Taluqdars in Oudh by sec 19 of the Oudh Estates Act 1869 A will executed by such a Taluqdar ran as follows - I have executed this will with the consent of all my sons and have got them to ugn it as witnesses with this very purpose so that this will may be acted upon fully and they may not quarrel among themselves after my demise held that the testator obtained the signa tures of the sons for some special purpose of his own (viz to obtain the co operation of his sons in carrying out the dispositions of his will) and not for the purpose of attesting to the will that they were not attesting witnesses and were not disqualified under this section from taking under the will-Shiam Sundar v Jagannath 1 OWN 881 28 OC 91 AIR 1925 Oudh 465 (467) 85 IC 558 affirmed by the Privy Council 4 OWN 1205 AIR PC 248 (249) 32 CWN 305 A person who signs a will for a special purpose, vi in token of his agreement with the terms of the will is not an attesting witness even though the word witness appears above his signature-Mohammad Als Khan v Nisar Alt 109 I C 835 A I R 1928 Oudh 67 (76)

68 No person, by reason of interest in, or of his section 55 Witness not disquals field by interest or by being executor of, a will, shall be Act X of disqualified as a witness to prove the secution of the will or to prove the validity or invalidity thereof

This section applies to Hindus Buddhists etc., see Sec 57 and Sch. III

Revocation of will by testator's marriage of the Section 56 a power of appointment, when the 1865 appointment is exercised would not, in default of such appointment, pass to his or her executor or administrator.

Liplanation —When a man is invested with power to determine the disposition of property of which he is not the owner, he is said to have power to appoint such property

66 This section does not apply to Hindus, Buddhists, etc.

or to the person entitled in case of intestacy

Where a Jew made a will subsequent to his first marriage, but previously to his second marriage during the lifetime of his first wife it was held that the will was revoked by the second marriage—Gabriel : Mordade, 1 Cal. 182 (149)

70 No unprivileged will or codicil, or any part there of, shall be revoked otherwise than by Revocation of unprivimarriage, or by another will or codicil, leged will or codicil

or by some writing declaring an inten-

tion to revoke the same and executed in the manner in which an unprivileged will is hereinbefore required to be executed, or by the burning, tearing or otherwise destroying the same by the testator or by some person in his presence and by his direction with the intention of revoking the same

### Illustrations

(i) A has made an unprivileged will. Afterwards A makes another uprivileged will which purports to revoke the first. This is a revocation.

(ii) A has made an unprivileged will afterwards, A being entitled to make a privileged will makes a privileged will which purports to revoke his unprivileged. vileged will This is a revocation

Notes -This section applies to Hindus Buddhists, etc. see sec. 57 and Sch III

This section is taken almost word for word from sec 20 of the English Wills Act 1837 (1 Vict C 26)

67 Scope of section—Revocation by parol, etc.—Prior to like passing of the Hindu Wills Act the will of a Hindu could be revoked by Parol.

Thus, when defining Thus where definite authority was orally given by the testator to destroy his will with the intention of revoking it that was in law a sufficient revocation although the will was not in fact destroyed—Pertab Narain v Subhao 3 Cel 626 (643) (PC)

After the passing of the Hindu Wills Act this section was made applicable to the wills of Hindus in the province of Bengal and in the towns of Bombay and Madras But outside these places, will could be revoked by any other mode besides those prescribed in this section. Thus in case of a will made outside the town of Madras, actual destruction or a formal resocation in whinf was not essential to constitute revocation. The testator during his illness made a will which wa deposited and regi tered in the office of the Registrar Alter recovering from his illness he appointed a Vakil to obtain the will out of the Registry and to restore it to him but owing to some blunder this was not d at but the testator's intention was to get the will back ino his own possession and not to leave it as it was. Held that the will must be treated as nickel-Senkayamma v Venkalaramanayyamma 25 Mad 678 (685) (PC) But the Court insisted on very clear cogent and consistent proof of an oral revocation and on the evidence being precise as to time and place—Alavandar v Danato'h 99 IC 775 AIR 1927 Mad 383 (385)

But after the passing of the Indian Succession Act 1925 and especially after the enactment of clause (c) to sec. 57 all wills executed by a Hindu after the 1st January 1927 in all parts of India must conform to the provinces of this Part and no will can be revoked otherwise than as provided by The above case are no longer of any authority

section This section doe not apply to Mahomedans therefore in case of side persons actual destruction or formal revocation is not essential to con titute the revocation of a will a bequest may be revoked by express declaration oral or written. Thus where a testator expressed in a Court of Justice his intention of revoking a will previously made it was held that there was a valid revocation, notwithstanding the fact that the testator did not destroy the existing will or make any subsequent will—Attran Bakhsh v Mehr Bibs 1916 P.L.R. 41 31 I.C. 693 (694)

68 Revocation, what is not—In India a will is not revoked by marriage or by the subsequent birth of a son or by the birth of a posthumous son. The statutory law of will in India has not adopted the principle of English law that a will should be deemed to be revoked in consequence of a change of circumstances of the testator or a change with respect to his right to the property disposed of by will—Subba Reda v Dorasami 30 Mad 369 (372) (FB) 17 MLJ 269 Bodi v Venkataswami 38 Mad 369 (372) Alavandar Gramani v Danakoti Ammal 99 IC 775 AIR 1827 Mad 383 (385) A will is not revoked by the subsequent birth of a son to the testator especially when that son died during the heliume of the testator A will comes into operation at the death of the testator and this intermediate alteration in the character of his right in the property (by the birth of the son) should not invalidate a disposition which he could validly make both when he executed the will and when the will came into operation in law—Bodi v Venkatasuami 38 Mad 369 (373) 25 MLJ 363

Similarly the adoption of a son by the testator does not by itself revoke a will any more than the birth of a natural born son especially when there is nothing in the deed of adoption declaring expressly an intention to revoke the will which the testator had previously made in favour of his wife—Mir Syed Hasan v Tayaba 1 O.1, 591 26 1C 547 (589)

The mere fact that the testator during his lifetime disposed of part of the property specified in the will cannot be regarded as an act revoking the will because the testator had full power to dispose of his property during his life time and the devisees would get only the property remaining undisposed of at the time of his death—Asanand v Roshni Bai 2 Lah L J 178 Thakar Singh v Arya Printinghi Sabha 29 PL R 534 110 I C 700 A IR 1932 Lah 934 (935)

Since revocation must take place during the lifetime of the testator he cannot delegate his power of revoking a will by inserting in it a clause conferring on another an authority to destroy it after his death—Stockwell v Rithardon 1 Robert 661

Coded —A codeal will not be impliedly revoked by the mere fact of the revocation of the will and the codeal notwithstanding remains effectual unless it appears that in revoking the will the testator thereby intended to revoke the codeal as well—In the goods of Sanage LR 2 P & D 78 Black v Jobling LR 1 PD 685 Gardiner v Courthop 12 PD 14 No doubt a codeal is dependent on the will but if it could be established that the testator intended the codeal to stand by itself notwithstanding the revocation of the will the Court would give effect to the codeal Where the will and the codeal were so independent of each other that either could stand alone the testator could very well intend to revoke the will and such revocation of the will would not be a concurrent revocation of the codeal—Surendra v Sitadas 35 CLJ 488, AIR 1822 Cal 182 (184) 69 IC 867.

69 Any part thereof —A part only of a will may be revoked in the ment here described—Clarke v Scripps 2 Robert, 563 (567) In the goods of Woodward LR 2 P & D 208 If the testator after the execution of the will destroys a part only of it by teaming or cutting away or cutting out portions of it, animo revocation as to the parts so removed this will amount to a revocation pro least—In the goods of Lambert 1 Notes of Cas. 131, In the goods of

Cooke 5 Notes of Cas 390 With respect to the destruction of a part the intention with which the act is done must govern the extent of operation to be attributed to the act and determine whether it shall effect the revocation of the whole instrument or only of some and what portion of it. And the intention to revoke wholly or only in part may be evidenced either by proof of the expressed declaration of the testator of his intention in doing the act or by proof of circumstances from which it may be inferred or by the state and conduction to which the instrument has been reduced by the act itself—Clark v Scripps 2 Robert 563 (567 568) Williams v Jones 7 Notes of Cas Ib Leonard v Leonard [1902] P 243 Thus the mere cutting of three lines from the beginning of a will was held in the absence of other circumstances not to show an intention to revoke the whole will—In the goods of Woodman LR. 2 P & D 266

After having made a will the testator executed a deed of sale in which wrote I have cancelled the said will and rendered it null and void and be conveyed only two of the properties decised by the will Held that the general scope and intent of the deed of sale was not to revoke the previous will in the entirety—Remprasad v Basantia 6 PLT 615 89 IC 1009 AIR 1929 Pat. 729 (731)

70 "By marriage" —In applying this section to Hindus, Buddhists, etc. the words by marriage should be omitted because the proviso to see. 57 expressly lays down that marriage shall not revoke any such will or code!
See Schedule III para 4

In legislating with reference to the question of the extent to which the provisions of the Succession Act should be made applicable in the case of will executed by Hindus the legislature must be taken to have considered the extract to which the enactments of the Succession Act were in keeping with Hindu sentiment and with the spirit of the Hindu law. The outcome was that the English rule of law that marriage should operate so as to revoke a will was expressly excluded in the case of wills made by Hindus on the ground that so far as Hindus were concerned marriage did not raise a presumption of intenuor to revoke a will—Subba Reddi v Deroasami 30 Mad 369 (371)

71 'By another will or codicil'—The mere fact of making a subsequent testamentary paper does not work a total revocation of a prior con unless the latter expressly or in effect revoke the former or the two be incapable of standing together for though it be a meaning that no man can die with two testaments yet any number of instruments whatever be their relative date for in whatever form they may be (so as they be all clearly testamentary) may be admitted to probate as together containing the last will of the deceased—Williams on Executors (11th End) Vol I 116 In the goods of Petickill (18t4) 3 P & D 153 (per Sir James Hannen)

Where a will contains a clear and unambiguous di position of property rel or personal it cannot be resolted by a codicil except by the use of words equally clear and unambiguous.

If a subsequent testamentary paper be partially inconsistent with one of an earlier date then such latter instrument will revoke the former as to those parts only where they are inconsistent—In the goods of Petchell L. R. 3 P. & D. 153 (156). But it is necessary to consider minutely the nature and extent of the inconsistency of a later testamentary instrument which will have the disc of revoking an earlier will. In this investigation the Court is necessarily called upon to put a construction upon the language of the instrument in question. The intention of the testator conveyed in that language has to be accrtanced.

by reference to the facts in connection with which it is used but in seeking the true meaning of the testator the substance and not the form of the instrument must be regarded. If it can be collected from the words of the testator in the later instrument that it was his intention to dispose of his property in a different manner to that in which he disposed of it by the earlier document the earlier document will be revoked and this although in some particulars the later will does not completely cover the whole subject matter of the earlier—per Sir James Hanner in Dempsey Lauson (1877) 2 PD 98

If two inconsistent wills be found of the same date or without any date and no evidence can be adduced establishing the posternoity of the execution of other both are necessarily void and the testator must be considered intestate. But in every case the Courts will struggle to reconcile them if possible and collect some consistent disposition from the whole—Swinburne Part 7 s 11 pl 1 Godolphin Part 1 C 19 S 3 Phipps v Earl of Anglesca 7 Bro PC 443 Tourishend v Moor 1190s) P 66

The mere fact that a testator calls a will my last will or my last and only will does not necessarily import a revocation of all previous instruments—
Freeman v Freeman 5 De G M & G 704 Lemage v Goodban LR 1 P & D
57 Simpson v Foxon [1907] P 54 And so where a testator having duly
executed his will subsequently executed another testamentary paper which was
not found at his death and the contents of which were unknown save that it
was headed last will it was held that the words this is my last will did not
import that the paper contained a different disposition of the property and that
the mere fact of so calling it did not render it a revocatory instrument—Cutto
v Gibert 9 Moo P C 131 (overning 18 Iur 560)

Where by a testamentary paper all the testators property is given to a particular person without the appointment of any executor such paper will operate as a total resocation of a prior will even though an executor may have been appointed by such prior will— $Hoffrey \ V$  Henfrey 2 Curt 468 affirmed by the Privv Council 4 Moo V C 29

A subsequent will is no resocation unless the contents of it are known and it is not to be presumed from the mere circumstance of another will having been made that it revoked the former for it might be that the second will might concern other lands or no lands at all or be a confirmation of the former —Hitchins v Basselt 3 Mod 203 It is well settled that a will duly executed is not to be treated as revoked either wholly or partially by a will which is not forthcoming unless it is proved by clear and satisfactory evidence that the latter will contained either words of resociation or disposition so inconsistent with the disposition of the earlier will that the two cannot stand together. It is not enough to show that the will which is not forthcoming differed from the earlier will if it cannot be shown in what the difference consisted. It is also settled that the burden of proof less upon the person who challenges the will that it in existence—Sahib Minza v Unda Akanam 19 Cal 444 (450) (PC) Tribhau an v Deputy Commissioner 5 OL IJ 294 47 TC 225 (248)

The testator executed two wills of which the later commenced by stating As the wills previously executed by me have not been brought into force all the dispositions mentioned herein shall be operative after my lifetime and then the will repeated some of the legacies mentioned in the earlier will as well as a provision for the funeral expenses of the testator with some modification as to the amount but there was no mention of a certain sum stated in the earlier will. If the legacies were taken as intended to be cumulative they with the new and further provisions in the later will exceeded in amount the value of

THE INDIAN SUCCESSION ACT the estate. Held that the commencing words as well as the whole tenor of the second will clearly showed that it was the only will which was intended to be operative and it recoked the earlier will—Chinnappa v Kalasam 41 MLJ 661 [Sec. 70 AIR 1921 Mad 532 (535) 68 IC 11

Dependent relative revocation —Where the act of destruction of a will is so connected with the making of another as to fairly ruse the site ence that the testator meant the resocation of the old to depend upon the efficacy of the new disposition intended to be substituted such destruction will be ineffectual if the will intended to be substituted is inoperative so that it original testament will remain in force—Jarman on Wills (5th Edn.) Vol I Thus where a man made a second will in order to revoke the first, and then tore off the first will so that the second will would become operative but the caccard will would become operative but the second will would be second will will would be second will will would be second will would be second will would be second will would be second will will would be second will would be second will would be second will would be second will will would be second will would be second will would be second will would be second will would be second will will would be second will would be second will will would be second will would be second will will will would be second will will would be second w the second will was invalid as it was not duly attested held that the first will was not revoked by the act of tearing. The cancellation of the forms mill than the man than the man done from an action of the forms mill the few than the form of the forms and the forms of the few than the few th was done from an opinion that the second will had actually recoded the first which induced the testator to tear that as of no use. Therefore if the the Was not effectually revoked by the second neither ought the act of tearing the first to revoke it and it was insufficient for that purpose and the tearing and cancelling the first When he intended to revoke the first will by the second was only in consequence of his opinion that he thereby made good the second to be will the tearing and cancelling should not destroy the first but it ought to k Considered as still subsisting and unrevoked —Onions v. Tyrer 2 vem 19. The effect of cancelling depends upon the validity of the second will and ought to be taken as one and do not seem to be taken as one as one as one and do not seem to be taken as one a to be taken as one act done at the same time so that if the second will so the cancelline of the same time so that if the second will so the second will see th Valid the Cancelling of the first being dependent thereon ought to be looked upon as null and proposals. upon as null and inoperative and the first will must stand—Hintor v Poul 2 Brod & Bing 650 Gobinda Romanu v Rom Charan 52 Cal 748 28 CWN 331 (336 339) AIR 1925 Cal 1107 89 IC 104 Where a testator candud was prevented by the deast of the drawn up the preparation of which was presented by the death of the testator it was held that such carelland being preparation of the death of the testator it was held that such carelland only was not a revocation. In the many of the deceased making a new will and conditional only of the deceased making a new will also the deceased making a new will also the deceased making a new will also the deceased making a new will be deceased to the deceased making a new will be deceased to the deceased making a new will be deceased to the deceased making a new will be deceased to the deceased making a new will be deceased to the deceased making a new will be deceased to the deceased making a new will be deceased to the deceased making a new will be deceased to the deceased making a new will be deceased to the deceased making a new will be deceased to the deceased making a new will be deceased to the deceased making a new will be deceased to the deceased making a new will be deceased to the deceased making a new will be deceased to the deceased making a new will be deceased to t was not a revocation—In the goods of Applebee 1 Hagg 143 Dancer Could Cambridge of Applebee 2 Hagg 143 Dancer Could will be a missale of Applebee 2 Hagg 143 Dancer Could Cambridge 2 Missale Cambridge 2 Missale 2 Missal

IR 3 P & D 88 (104) Similarly if a man cancels his will under a smissle to make that he has been considered as the state of the state o in point of fact that he has completed another when he really has not the an point of lact that he has completed another when he really has not will (complete as to accept the cancels it under a mistake of law that a second in the will (complete as to execution) operates upon the property contained in the first when from some classed as to execution). with (cumplete as to execution) operates upon the property contained in when from some clerical rule it really does not this cannot be deemed a valid cancellation—by Lord Enable to the cannot be deemed at the cannot be dee valid cancellation—per Lord Ellenborough in Perrott v Perrott 14 East 40 A Hindu testator made a will in 1899 in which he nominated one V as his

son and directed that if he should die before completing the adoption of it should after his said. his wife S should after his death take V in adoption and the will further that if V should do horse the take V in adoption and the will further take another than the will further than another than a second than the se Provided that if V should die during the life time of S she might take another son in adoption. The restaurance to the life time of S she might take another take V. Son in adoption The testator himself adopted V in February 1890 In March death of V his issues should such a direction that in case of the death of V his issues should enjoy the property. There were in it in was controlled the former will and a should enjoy the property. There were in it in was to former will and a should enjoy the property. usant us y ans issues should enjoy the property. There were in it no working the former will and it did not refer to the clause in the former will be deadly the clause in the former will be the did to the clause in the former will be deadly the clause in the clause will be deadly the clause will be dead which save S a contingent power of adoption of died in 1891 In 100% C contact of the clause in the former class of the died. V died in 1891 In 100% C contact of the clause in the former class of the died of the clause in the former class of the died of the clause in the former class of the died of the clause in the former class of the died of the clause in the former class of the class of the clause in the former class of the class of the clause in the class of the which gave 3 a contingent power of adoption On 4th April 1890 the texas then her by the will of 1890 The adopted P in accordance with the authority debrated Recent there on the will of 1889. The reversionary hear of V sued for a decimal valid because after the adoption of P. Held that the will of 1890 was not the valid because after the adoption of P Held that the will of 1890 was small of another conscience the adoption of V and the consequent admission into the profamily of another coparcener the testator had no power to dispose of the pro-

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perty which was ancestral property Therefore the will of 1890 being invalid did not revoke the will of 1889 and S had under the will of 1889 validly adopted Pe-Venkatanarayana v Subbanmal 39 Mad 107 (114) (PC) 20 CW.N 234 AIR 1915 PC 37 32 IC 373

'By some writing," etc. -A will may be expressly revoked by some writing declaring an intention to revoke the same and executed in the manner in which a will is required to be executed. Where a testatrix devised real estates and by a subsequent void deed attested by two witnesses conveyed them to other trusts it was held that the deed was not a writing declaring an intention to revoke-Ford v De Pontes 30 Beav 572 The intention to revoke need not be declared in such express terms as I do declare that I intend to revoke my will but must be in equivalent terms amounting to that-Ibid Thus where the testator had obliterated the whole of a codicil including his signature by thick black marks and at the foot of it had written the words signed by himself and attested by two witnesses we are witnesses of the erasure of the above it was held that the codicil was revoked for the words above mentioned were a writing declaring an intention to revoke it-In the goods of Gosling 11 PD 79 Where the testator sent a letter signed by himself and attested by two witnesses desiring the destruction of his will the latter was held to revoke the will-In the goods of Durance LR 2 P & D 406 Toomer v Sobinska [1907] P 106

The intention to revoke must be clearly proved. Where a devise in a will is clear it is incumbent on those who contend that it has been revoked by a codicil to show that the intention to revoke is equally clear and free from doubt as the original intention to devise—Doe v Hicks 8 Bing 479 A document alleged to operate as revocation of a previous will must be in clear and un ambiguous words and if a person propounds a document which he alleges to have the effect of setting aside a previous will the burden of proof to be laid upon the propunder must be just the same as legally lies upon the propunder of the original will and once any circumstances are shown to east which may reasonably excite proper and well grounded suspicion in the mind of the Court a person claiming under such document is bound to satisfy the Court not only as to its mechanical execution but also as to the fact that the executant fully understood the nature and terms of the document—Mir Syed Hasan v Tayaba 1 OL J 591 28 1C 547 (557)

Burning, tearing -In order to operate as a revocation of the will it is not necessary that the instrument itself should be consumed or torn to pieces-Bibb v Thomas (1749) 2 W Black 1043 But there must be an actual burning of the will to same extent in order to effect a revocation of this nature a mere intention and attempt to burn is insufficient-Doe v. Harris 6 A & E 209 How much of the will should be burnt or whether the will should be torn into more or fewer pieces it is not necessary to lay down but there must be such an injury with intent to revoke as destroys the entirety of the will because it may then be said that the instrument no longer exists as it was -- per Colendge J in Doe v Harris (supra) What acts of tearing burning cancelling etc are sufficient to constitute a total or partial revocation must depend to a considerable extent upon the circumstances of each case-Johur Lal v Dhirendra 20 C.W.N 304 (310) 34 I C 707 If the document should be entirely burnt up entirely obliterated or torn into scraps or covered with cross lines there would be no doubt as to the intertion of the testator. But it is not necessary to go to that extent in any of the modes in order to answer the requirements of the statute and the slightest degree of either mode is effected as to such revocation provided it appears that the act was done with intent to have it constitute a revocation—Price v Powell (1858) 3 H & N 341

Tearing-how far indicative of revocation -By tearing is not meant a literal tearing to pieces the slightest act of tearing with intent to reiske the whole will thereby is sufficient for the purpo e A revocation of will consist of two elements under section 57 of the Act the intention of the testator and some outward act or symbol of destruction A defacement obliteration of destruction without the animo revocands is not sufficient. Neither is the intention the animo revocands sufficient unless some act of obliteration or destruction is done What acts of tearing burning cancelling or obliterating are sufficient to constitute a total or partial revocation must depend to a considerable extent upon the circumstances of each case In the case of John Lall De v Dhirendi Nath De 20 CWN 304 34 IC 707 23 CLJ 314 the revocation was attacked on various grounds principally that no material portion of the will had been torn and that as it was torn to the extent of a few inches only along its width the tearing could not be taken to amount to revocation. Sanderson CJ in dealing with the point observed In that case there was a tearing of the will a tearing across all the pages of the will but one of them was completely torn through and it came about in this way. The testator when he began to tear them intended to revoke the will Before he completely tore them he was prevented by the exclamation of those who were in the room from completing the tearing by tearing right through and therefore he never actually completed that which he et out to do In this case if we accept the finding of fact which I have said we ought to do that what the testator was told by his attorney to do was to tea the will partially and Mr Justice Chaudhury has found on the evidence that he carried out those instructions the testator did complete that which he set out to do It is pretty clear to my mind upon the authority of the learned Judge who gave judgment in that case and I adopt what he says that the Legislature does not mean that the testator must rend the will into more pieces than it originally con isted of The learned Judge adds and therefore no one sheet of paper was completely divided I think that the tearing might be sufficient to revoke if done with that intention But in order to make it effectual he miss have intended to revoke by so tearing it by which I mean that he must have intended that which he actually did of itself to have that effect without more Mr Justice Chaudhury has found quite clearly on the evidence and I do not intend to interfere with that finding that when the testator did tear the will in the way he did he did intend to revoke it by so tearing and he did not intend to do any more tearing That being so I think it comes sufficiently within the meaning of the section I have to refer to one other case which the learned counsel has cited this morning in the course of his argument—Bibb Dem Molt Thomas (1749) 2 W Black 1043 In that case the testator being in both one day near the fire ordered a person to fetch his will the will was fetched and then he opened it and gave it rip with his hands and then rumpled it together and threw on the fire but it fell off and was not burnt. The person who in the room picked it up and kept it without his notice. It was left to the part to consider whether that was sufficient resocation and the jury found that it was and that the testator intended to revoke it and when it went to the Court, Could Justice Grey observed that this case fell within two of the specific acts described by the statute it was both a burning and a tearing although as a matter of fact in that case the will had got only a rip with the hands and had fallen of the fire being slightly burnt without being senously injured.

A will may be revoked by tearing off the signature and attestation—In the goods of Leuis 1 Sw & Tr 31

The tearing off of the seal of a will animo resocands would amount to a resolution of it by reason of its being a destruction of its entirety—Price v Poucil (1883) 3 H & N 341

Otherwise destroying ... The excision of the name of the testator amounts to a revocation of the will under the terms otherwise destroying is not necessary in order to operate a revocation that the whole instrument should be destroyed it is sufficient if the entirety or the essence of the thing is destroyed. The testator may revoke his will by obliterating his signature if he has so carefully obliterated it that it is perfectly illegible, such an oblitera tion would amount to a destruction. Similarly if the names of the attesting witnesses were taken away by the testator animo revocands it would be a good destruction of the will under the statute. Likewise if the signature of the testator had been burnt or torn out that would be clearly sufficient to revokeper Sir H Jenner Fust in Hobbs v Anight (1838) 1 Curt. 768 It is a sufficient revocation within this section if the signature of the testator is scratched out as with a knife-In the goods of Morton 12 PD 141 The destruction must be destruction with an intention to revoke and the proof of the intention to revoke must not depend on parol evidence-Price v Powell (1866) 1 P & D 209 (212) Cheese Lovejoy (1877) 2 PD 251 There must be a real act of destruction mere symbolical destruction is not sufficient-Cheese v Lovejoy supra. A will is not destroyed by being merely struck through with a pen The destruction must be by some method ejusdem generis with those described in the proviso to this section. Both under the English and the Indian statute law cancellation appears to have ceased to be one of the ordinary modes of revocation. Therefore where the testator had drawn two cross lines on the first page of the will and wrote the words. This will is cancelled, but otherwise the will was intact it was held that the will could not be held to have been revoked-Aharshetji v Aekobad 52 Bom. 653 30 Bom LR 473 109 IC 742 AIR 1928 Bom 194 (198) But where the testator wrote the word cancelled across both sides of the half sheet of paper on which the will was written and drew several lines in ink through his signature and the signatures of the attesting witnesses in such a manner as to make it extremely difficult if not impossible to decipher those signatures and certainly impossible for the signa tures to be identified as his and the witnesses signatures it was held that the obliteration of the signatures constituted a destruction and consequently a revocation of the will-Thaddens v Thaddens 6 PR 1899

Where a testatrix having executed her will by signing her name at the foot of each sheet cut off the signatures on the first five sheets and cancelled her own signature at the end of the last sheet writing underneath that she had cancelled the will hidd that the will was destroyed in its entirety and could not be admitted to probate—In the goods of Harris 3 Sw & Tr 485. Where the testator had subscribed each of the several sheets of which her will consisted at the foot of each sheet in the presence of the attesting wintesses who there upon also subscribed each sheet in his presence and on his death two of the middle sheets of the will only could be found it was held that the signatures at the end of the will being the only ones made in compliance of the statute having been destroyed the whole will was revoked and the sheets that had been found though duly attested could not be admitted to probate—In the goods of Gulfan 1 Sw & Tr 125. But in India the law does not require that the signa ture of the testator must be placed at the end or foot of a will the usual

practice is to put down the signature on the right hand corner of the top of the first page and therefore where in case of a will consisting of two sheets the first sheet alone was found after the death of the testator the loss of the second sheet would not raise the presumption of the entire will being destroyed and probate could be granted in respect of the first sheet. See Kedar Nath v Saiopa 26 Cal 634 (636)

76 Lost will — In England where a will shown to have been in the curve with the state of the testator and last seen there is not found at his death the presumption arises that the will have been destroyed by the testator for the purpose of revoking it it cannot be presumed that the destruction has taken place by any other person without his knowledge or authority—Rickardi v Mumford 2 Phillim 23 Column v Frester 2 Hagg 266, Lillie v Lillie 3 Hist 184 Welch v Phillips (1936) 1 Moo P C 299, Broun v Broun (1888) 8 E & B 882 27 L J Q B 173 Sugden v Lord St Leonards (1876) 1 PD 184 Allian v Morrison [1900] A C 604 But of course this presumption may be rebutted by facts The presumption will be more or less strong according to the character of the custody which the testator had over the will—Sugden v Lord St Leonards (ubs supra p 217)

This presumption may no doubt apply in India but having regard to the special condition prevalent here where deeds are not kept and preserved with the same care as in England it may be equally presumed that when a will is not forthcoming after the testator's death it has been mislaid. This presumption may well arise particularly in a case where it is shown that the testator's papers were after his death accessible to the very person who was interested in destro) ing the will-Anwar Hossain v Secretary of State 31 Cal 885 (892) Shibsabin v Collector 29 All 82 (87 88) 3 ALJ 747 Uttam Das v Chanan 51 PR 1913 20 IC 462 (464) Feroze Din v Mula Singh 26 PLR 244 AIR 1925 Lah 540 85 IC 542 Hanuania v Padman 1913 PLR 292 20 IC 501, on appeal Padman v Hanwanta 93 PR 1915 (PC) 29 IC 807 (810) In an English case also it has been observed that the fact of the will being last traced to the possession of the testator and not being found is not conclusive that he had cancelled it If for instance it could be shown that the heir at law had access to the place where the testator had deposited the will and grounds could be short for a suspicion that he had destroyed it it would be a case to consider-pt I ord Campbell CJ in Brown v Brown (1858) 8 E & B 876 (884)

In order that the loss of a will may raise the presumption of revocation if must be conclusively proved that the will was not in existence at the time of the testator s death—it must be shown that after the death of the testator a send was made for the will by a responsible and independent person and that it was not then forthcoming—Shib Sabitis v Collector 29 All 82 (87) The private that a will in the testator's possession and not forthcoming after be death has been revoked does not arise unless there is evidence to satisfy the Court that it was not in existence at the time of his death. It is the resultance of the paper at the time of death which leads to the legal presumption of revocation—per Sir P Wilde in Finich v Finich (1887) LR 17 & D 37 (374) "Aniaar Hossein v Secretary of State 31 Cal 885 (832) So where there are circumstances which raise a strong presumption in favour of the view that the will did not subsist at the time of the testator's death the presumption may well arise that it was destroyed by the testator with a view to revoke it. Schan Bibs v Haran Bib 10 TC 230 (231)

In case of a lost will it is not sufficient to show that on a certain occasion the deceased had said that he had destroyed the will. There must be evidence

of other circumstances leading to the same conclusion—Shib Sabitri v Collector 29 All 82 (86) A statement by a testator that he had altered his mind as to the disposition of the property and he had therefore destroyed the will is merely an evidence of intention from which the fact of destruction may be inferred if there are other circumstances leading to the same conclusion but it may not be evidence of the fact of destruction of the will —per Sir J Hannen in Keen v Keen (1873) LR 3 P & D 105

But a presumption of revocation does arise in case of a will not found after the testator's death where the facts are that the will was made at the time when the testator was a bachelor that after executing the will the testator marned and had a son and that under the will the son would be entirely dis inherited and left to starve unless the legatee out of compassion chose to allow him some maintenance—Ottam Das v Chanan 51 PR 1913 20 IC 462 (464) So also where a testator made a registered will and gave it to another person for custody but called for the will shortly before his death and kept it with him and it was not forthcoming on his death the presumption would be that the testator had destroyed the will—Adstram v Bapulai 45 Bom 906 (908) 23 Bom IR 276 A IR 1921 Bom 143

If the execution of the will in the manner required by law is proved it lies upon the objector to plead revocation in case of a lost will. If revocation is not pleaded the Court will not presume it from the fact that the will (which is a registered one) is not forthcoming—Sarat Chandra v Golap Sundari. 18 CWN 527 (550)

77 'With the intention of revokings' —The destruction of the will must be with an intention to revoke—Price v Powell (1866) 1 P & D 209 (212) A symbolical burning tearing or destruction will not do there must be the act as well as the intention All the destroying in the world without intention will not revoke a will nor all the intention in the world without destroying there must be the two—per James L J in Cheese v Levejoy 2 PD 251 (253) On the other hand if there is an intention to revoke the will by burning it then there is sufficient revocation if it is thrown into the fire though it is not burnt and is picked up by somebody in the room without the testator's notice—Bibb v Thomas (1749) 2 W BI 1043

An act done without the intention to revoke is wholly ineffectual. Thus were a testatrix being under an erroneous impression that a codict! had not been duly executed directed it to be torn up and sent to her solicitor to be recopied but died before she could reexecute it held that the tearing did not amount to revocation and probate of the codicil might be allowed—In the goods of Thornton 14 P D 82

An insane cannot have any intention so where there is proof that the will was duly executed by a testator who afterwards became insane and the will was found mutilated the onus of showing that it had been mutilated by the testator when of sound mund is on the party alleging the revocation—Harris v Berrall 1 Sw & Tr 153

71 No obliteration, interlineation or other alteration Section 58
made in any unprivileged will after the 1855

Effect of obliteration interlineation or alteration in unprivileged will

execution thereof shall have any effect, except so far as the words or meaning of the will have been thereby rendered

illegible or undiscernible, unless such alteration has been

executed in like manner as hereinbefore is required for the execution of the will

Provided that the will, as so altered, shall be deemed to be duly executed if the signature of the testator and the subscription of the witness is made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will

This section applies to Hindus Buddhists etc, see Sec 57 and Sch III

This section is based on Sec 21 of the English Wills Act 1837 (1 Vet

C 26)

78 Scope of section —This section applies to alterations and intrilineations made after the execution of the will Therefore where the execution
applied for probate of a will with various alterations and intellineations made
in pencil by the testator himself some time bcfore the execution of the same the
Court granted probate with a copy of the will showing the alterations and infel
lineations in red ink—In the goods of Broughton 29 Cal 311 (313)

Where unattested alterations appear on the face of a will and no information can be given and there are no circumstances one way or the other to store when the alterations were made the presumption is that the alterations were made effer the execution of the will—Copper v Bockett (1846) 4 Moo PC 419 In the goods of Adamson (1875) LR 3 P & D 253 (256) Pandarant V Vinayak 16 Bom 652 (655) Surendra v Ram Dassi 47 Cal 1043 (1055) C NN 860 59 IC 814

If some subsequent alterations which were unattested were made in a xil properly executed by the testator probate or letters of administration (as the case may be) should issue with a copy of the will unthout those alterationary to the control of the xill unthout those alterationary of the xill and xill and

A will may in part be admitted to probate and in part refused; and so if the Coart is satisfied that a particular clause has been inserted in it by fine if without the knowledge of the testator or by forgery probate will be granted of the remainder of the will omitting such clause—Bannau Chaian \(\chi\_{\text{alignt}}\) Author Day 15 CWN 1014 (1017) 11 IC 152 If an alteration (effect addition of more names of witnessess) be made in a will after its execution and without the knowledge of the testator it will prevent the party who altered it or in whom the content of the party who altered it or in whom the content is will not for all purposes and the altered instrument may be used as proof of some right or title created by or resulting from its being executed—Pertamine \(\chi\_{\text{max}}\) Ramachandar \(\text{7}\) \(\text{4.00}\) (2030) (2030)

The obliteration must be such that the words or meaning of the will should be rendered illegible or undiscernible. Consequently if the words are compact? obliterated so that it cannot be made out what they originally were the cheration is val d, and probate mat the granted as if there were blank in the \*\*—Williams on Executors (11th Edn.) Vol I p 104 So also where the testing wrote the word cancelled across the paper on which the will was written, and drew several lines in ink through his signature and the signatures of the attention

witnesses in such a manner as to make it impossible for the signatures to be identified held that the obliterations of the signatures amounted to a total destruction of the will-Thaddens v Thaddens 6 PR 1899 In order to ascertain whether the obliterations actually rendered the words of the will illegible the Courts may have resort to glasses Thus in a case Sir H Jenner Fust ordered that the erasures in a will should be carefully examined in the registry with the help of a glass to ascertain whether they could be made out and directed that probate should pass with the erased passages restored unless they could not be made out and then with those parts in blank. In the goods of Ibbetson 2 Curt 337 But the Court should not adopt any other means except inspection by aid of glasses for ascertaining what the words attempted to be obliterated were Chemical agents should not be resorted to in order to remove any portion of the obscuring ink. Thus, where the testator effaced the original writing by pasting a paper over it it was held that the effacement was complete and the Court should not remove the pasted paper used as the instrument of obliteration -In the goods of Horsford LR 3 P & D 211

The alteration shall be executed in the same manner as is required for the execution of the will with this difference that in the execution of a will the signature of the testator and the attesting witnesses may be placed anywhere (Sec. 63) but in the case of alterations the signatures must be made in the places mentioned in the present section. Thus the initials of a testatrix and the attesting witnesses in the margin of a will opposite to the interlineation are sufficient to render the interlineation valid-In the goods of Blewitt 5 P.D 116 In the goods of Wukinson 6 PD 100 Where a testator at the beginning of the will disposed of certain houses for the benefit of his children and the words describing one of such houses were struck through by a pen and at the end of the will a clause was interlined bequeathing such house to his wife and under the signature of the deceased and the witnesses a memorandum duly signed and attested was added to the effect that the above words had been struck off for the benefit of the testator's wife it was held that the memorandum referred to the interlineation as well as to the obliteration-In the goods of Treeby LR 3 P & D 242

72 A privileged will or codicil may be revoked by the Section 59
Revocation of priviled will or codicil, or by any act expressing an

leged will or coded coded coded, or by any act expressing an intention to revoke it and accompanied by such formalities as would be sufficient to give validity to a privileged will, or by the burning, tearing or otherwise distroying the same by the testator, or by some person in

tustroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same

Lyplanation—In order to the revocation of a privileged

Explanation—In order to the revocation of a privileged will or codicil by an act accompanied by such formalities as would be sufficient to give validity to a privileged will, it is not necessary that the testator should at the time of doing that act be in a situation which entitles him to make a privileged will

This section does not apply to Hindus, Buddhi, is, etc.

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73 (1) No unprivileged will or codicil, nor any part thereof, which has been revoked in any

Revival of unpnvi leged will manner, shall be revived otherwise than by the re-execution thereof, or by

a codicil executed in manner hereinbefore required and showing an intention to revive the same

(2) When any will or codicil, which has been parily revoked and afterwards wholly revoked, is revived, such revival shall not extend to so much thereof as has been revoked before the revocation of the whole thereof, unless an intention to the contrary is shown by the will or codicil

79 This section applies to Hindus Buddhists etc. see sec 57 and Sch.
III This section is taken almost word for word from sec 22 of the English
Wills Act 1837 (1 Vict C 26)

A revoked will may be revived only in the manner specified in this section. The destruction of a second will which revokes a will of an earlier date cannot reinstate the first will even though it may be in existence at the time of the testators death—Brown \* B to & B 876

### CHAPTER VI

# Or the Construction of Wills

Wording of wall, terms of art be used in a will, but only that the wording be such that the more than the the testator can be known therefrom

This section applies to Hindus Buddhists etc. see sec 57 and Sch. III

80 No technical words necessary—A testamentary decurrent of the Court are not more scrupulous with respect to the langues that the nature of instruments which it allows to operate as testamentary. It is not held necessary that the directions contained in them how properly should be disposed of in the event of death should be in direct and imperative term wishes and requests have been deemed sufficient—Passmore v Passmore 1 Philing 218

No technical words are necessary for a will. The rule of construction in a Hindu as in an English will is to try and find out the meaning of the test are taking the whole of the document together and to give effect to its rear in applying the above principle. Courts of Justice in this country ought not to judge the larguage used by a Hindu according to the artificial rules show been applied to the language of people who her under a different system of law and in a different state of society. It is immaterial what the form of the document ruly be but if it embodies the legal declarations of the intertact of the tessator with respect to his property, which he desires to be carried as

effect, it is a will-Din Tarini v Arishna 35 Cal 149 (156) 13 CWN 291, 1 I C 791

## Rules for the construction of Wills -

80A. The cardinal rule of interpretation for deeds as well as other instruments is to gather the intention from the words to take into consideration the entire deed, and to adopt an interpretation which gives effect if possible, to all the parts and does not reject any of them-Purnananthache v Gopalaswams 41 CWN 14 (PC) In Roddy v Fitzgerald 6 HLC 876 Lord Wensleydale. in referring to the rules for the construction of wills said. These rules are perfectly plain and clear. The first duty of the Court expounding the will is to ascertain what is the meaning of the words used by the testator. It is very often and that the intention of the testator is to be the guide but that expression is capable of being misunders'ood and may lead to a speculation as to what the testator may be supposed to have intended to write whereas the only and proper inquiry is what is the meaning of that which he has actually written. That which he has written is to be construed by every part being taken into considera tion according to its grammatical construction and the ordinary acceptance of the words used with the assistance of such parol evidence of the surrounding circumstances as is admissible to place the Court in the pouton of the testa or"

In Gordon v Gordon 5 LRE & 1 App 284 Lord Carra, as to the controlled of will said I take the law on this subject to here been expressed with much accuracy and febrity by Lord Cranworth, and when he present consistently adhered to cound and stret processes of accusation in the interpretation of wills. In the case of Abboti v Malara THLC 63 beto e this House Lord Cranworth speaks thus. Where by saining on the activity country that of the words used we are driven to the conductor in the perior way then it acting capticusty without any intelligible matrix, contain to the ordinary mode in which men in general act in similar case, then if the formatic admits of two constructions we may reasonably and properly diff that which a odd these anomalies een though the construction admits at the most of way or the most grammatically accurate. But if he presented as well as the formatical process which is consider capticious of even harsh and interaction.

In construing a will the Court Louis rest the will as a wine and con der all the clauses and the circumtances to find the life and of the tentates and give effect to it as far as the ter permit Impresses that id not be attached to isolated expressions. If we are a way and there of the 2.8 represent to words by which an = = To 1 for formed they have to be discarded -Kanhaya Lall v Hua P ... The FILT E1 AIR 1905 Part 323 163 IC 940 Where a counter that I 2 mal trace to a toront of all the properties in fa our of we set he settlements, the later dames restricting the bequest should be so - at Car and the function as her writer provisions of the will in farm of the first states and the farment and the forestations the will be stated in the farment and Construing the will to recorde at the state of the Arish Charitie - Construing the will to recorde at the state of the sta pada AIR. 1936 Cal 6-2 Command and Arabal Charles speaking a different to the second and the sec speaking a different towns of the state of t up under different continue of the set in the set of th of a teo need construction of the state of t AUM 1932 (PC) 19 GIC TO TO THE IS CLI CL

It is always decrees 1 - y to its in which I a different of

Epurpose of construing the will which is in controversy before the Court. In the case of Bhupati Chandra Basu v Chands Charan Basu Malik (39 CWN 39). Mitter J observed The proper rule in cases of this kind is laid down by Lord Sargant in the case of Lloyds Bank Ltd v Fenuck (2 Ch 7/8). One will will not be construed with reference to another but that does not mean that one is debarred from seeking assistance from the reasoning which the Courts have employed in construing bequests of a similar character in the case of Narendra Nath Sarcar v Kamal Basin Das (23 IA 18 23 Cal 58) is laid down that to construe one will by reference to expressions of more or less doubtful import to be found in other wills is for the most part an unport able exerce ie Happily that method of interpretation has gone out of fashina in this country. The same rule of construction has been laid down by that Lordships of the Judicial Committee in the case of Kamakhya Dat Ram v Kushal Chand 38 CWN 477

Rules established in English Courts for construing English documents are not as such applicable to transactions between the people of this country (India) Rules of construction are rules designed to assist in ascertaining intention and the applicability of many such rules depends upon the habits of thought and modes of expression prevalent amongst those to whose language they are applied English rules of construction have grown up side by side with a very special law of property and a very artificial system of conveyancing and English documents are ordinarily framed with a knowledge of the very rules of construction which are afterwards applied to them. It is a very serious thing to use such rules in interpreting the instruments of Hindus who view most transactions from a different point think differently and speak differently from Englishmen and who have never heard of the rules in question—Ram Lell \ Kanat Lali 12 Cal 663 (678) Bhagabatt Barmanya V Kalt Charan 38 Cal 468 There are many English rules as to the constructions of wills and administration of estates which I shall hesitate to apply to this country where large dispositions of property are made without any recourse to professional assistance -per Courts Trotter J in Rajah Parthasarathy v Rajah Venkatadii 46 Mad 190 (211) AIR 1922 Mad 457 70 IC 689

Principles of construction and cases —Certain principles upon which a will should be construed are well settled Firstly the Court should give effect to the plann meaning of the words used Secondly if there is sumbjuirly the Court should in interpreting the language lean towards carried out the known intentions of the testator as far as they can be accetained from the rectals and from the surrounding circumstances. Thirdly in interpreting ambiguous words the Court should bear in mind the presumption that the testator was not likely to intend to create an intestacy regarding the residence of the estate Fourthly the Court should not strain the language of the rule either in order to give effect to the apparent intention of the testator or a order to prevent an intestacy Finally the Court has no power to insert as the will a disposition which is missing however desirable that disposition may be.

 expenses. Finally the last clause stated As per the above directions my wife T should do all acts aforesaid with full rights. The wife T died some time after the testator. It was contended before the Courts that the testator by the last clause in the will intended that his wife should take and enjoy all the residue with full powers of ownership and that after the death of the widow the whole of the residue would go to her unmarried daughter and to her marned step-daughters. It was held that even if the preamble and the last clause which were not juxtaposed but separated by recitals of some length were to be read together it was very difficult to read into the preamble a disposition in favour of the widow merely by virtue of the direction in the final clause that she should do all acts aforesaid with full rights and these words could not have the effect of converting the widows management or administration into ownership that owing to unskilled draftmanship there was a complete omission to dispose of the residue but there was no disposition of the residue in favour of the widow and the result must therefore be an intestacy -histammal v Sarasuathi 48 LW 728 1938 MWN 1152

It is a well known principle of construction that no part of a will should be discarded and the will as a whole should be construed. An attempt should be made to reconcile apparent inconsistencies and if the different clauses of the will cannot in any way be reconciled resort must be had in the last instance to the principle that the last clause of the will dealing with the particular disposition of the properties should be taken to be the real intention of the testator.

In the preamble of a will a testator stated that he was making disposition of his entire estate. In paragraph (1) of the will he stated that after his death all his properties would vest in his wife but in the latter portion of the same paragraph he stated that his wife would be competent to sell an 8 anns share of all his properties according to her requirements and that she would have no power to sell the remaining 8 annsa share but that if there was any urgent necessity she would be competent to sell any mahal as a whole There was no express provision in the will for the devolution of the said 8 annsa share on the death of the wife. In paragraph (2) of the will the testator stated that his wife would be at hiberty to device to anybody she liked the property left by him. It was held that the wife was given an absolute interest with power of disposition over the whole of the properties left by the testator and that the last part of paragraph (1) of the will which appeared to cut down the power of altenation with regard to the 8 annas share was only a pious wish and nothing more—Mokshada Rangan v Surtarda Bugo (8 CL I 22

Where certain of the provisions of a will were intended to take effect on its execution but the other provisions clearly satisfied the requirements of the definition of a will as defined by see 2 (h) of the Succession Act it was held that the document must be regarded as containing provisions which make it a will and one in respect of which a probate may legally issue—Garib Shaw v Paisa Dassi 66 CLJ 337 ATR 1938 Cal 290 175 IC 920

A Hindu testator by his will gave all his properties to his wife for life without any power of shenation and after her death to his son in absolute right. There were also provisions in the will as to who should get the properties in case the son predeceased the testator or his wife. It was contended that these provisions indicated that the testator did not intend that the remainder would vest in the son immediately on his death but only on the happening of an uncertain event zize the son being alive after the death of the widow Overruling that contention it was held that under the terms of the will the

son got a vested interest in the properties on the death of the testator-Sur Chandra v Apit Kishore 42 CWN 605 177 IC 764 A1R 1938 Cal 465 A will provided that after the death of the testator and even in his lifetime in case he ceased to be in possession of his senses the wife should have proprietary possession over all the property and enter into proprietary possession and she should be entitled to and be owner of all the property. If a son should be born to the testator by his wife he should be entitled to the estate on attaining majority and until that majority the wife should supriving and manage the estate and remain in possession between malikana as a propietor would Should no son be born the daughter was to be owner of additional to the whole estate generation after generation after her mother. It was held that the wife was given only a life interest, and absolute interest will given to the daughter—5ir Ram v Mehamed Abdul Rahim A1R 1938 Ouds 69

In the case of Gundas Roy Chaudhury v Bhupendia Math Ghost & CWN 141 Sen J in discussing the principles of construction of wills observed. To construe one will by having recourse to the interpretation put on another will by some other Court because there are points of resemblance between them is a method of approach that does not commend itself to me A single word the turn of a phra e or the other terms of a deed may give to a clause a significance which is entirely different from that which would attach to a clause otherwise similar in another deed. It would in my opinion be a profitless task to compare the various interpretations put on the word her in the different wills which have formed the subject matter of judical decision in England. To use the words of Lord Macnaghten in the case of Normals Nath Struct v Kamablosium Dassit 23 I A 18 2 3 Cal 563—

To search and sift the heaps of cases on wills which cumber our English
Law Reports in order to understand and interpret wills of a people speaking
a different tongue trained in different habits of thought and brought up under
different conditions of life seems almost absurd

The better course would be to study the terms of the will under consideration to come to an understanding of the intention of the testator if possible and to give effect to this intention unless it is prevented by the law In armival at a decision regarding the intention of the testator certain principles of construction must of course be remembered. As was stated by Lord Diely in the case of Lalit Moham Smith Roy v Chukkmi Lal Roy 24 Cal 334 I CWN 337 (PC) there are two cardinal principles to be observed in the consideration of wills deeds and other documents. The first is that clear mid unambiguous dispositive vords are not to be controlled or qualified by any general expression of intention. The second is that technical words or words of known legal import must have their legal effect even though the testator distortion is the prefectly clear that the testator did not mean to use the technical terms in their proper sense. [Vide also Doe d Gallina v Gallini (1833) 5 B & M.

A clause m a will provided My legal advisor S C M shall remainence and a signal advisor and pleader after my death for protection of the interest of and for the benefit of the estate and so long as he will ruman engaged on business he shall get retainers and fees as fixed at present. The executor having discharged him it was contended by the said legal advisor that they were bound to retain him until the estate was fully administered or under the estate that the estate was fully administered or under the estate to compet the executors to employ him indefinitely without regard to their

own wishes or the requirements of the estate. All that was intended was that the appointment of S. C. M should not terminate automatically on the testator's death but that he would continue to be in a position to protect the estate by his professional services without a fresh mandate from the executors. In so holding Panckridge J observed in the judgment. I think it may fairly be said that the Court will not construe testamentary directions of the nature we are considering as trusts enforceable at the instance of the appointee unless the testator has indicated his intention in unambiguous language —Sarat Chandra > Sadatus 43 C.W.> 172.

Within ten years after my death A will of a Hindu provided as follows my wife will take a son in adoption from amongst the sons of my three full brothers or from amongst those of my step-brother. If it be impossible to take in adoption a son from amongst the sons of any one of them then after the expiry of ten years and within the next two years, she will take at her own choice a son in adoption from amongst the sons of my other agnatic relatives. In the absence of that or if that is not possible she will take a son in adoption from one of my gotra or from a different gotra. She will take the first son in adoption within twelve years as aforesaid. If the said son dies sonless, she will be entitled to take a second son in adoption even after the said period of twelve years. The brothers of the testator had sons but the widow deliberately did not adopt any of them within ten years from her husband s death. More than eleven years after however she adopted one of them. He however died childless within a few months and the widow made no other adoption

The High Court held that there was no provision prohibiting the adoption of a nephew after 10 years and by the adoption within 12 years the direction in the will had been complied with. But their Lordships of the Judicial Committee held (1) that the authority given by a husband to his widow to adopt must be strictly followed; (ii) that the power was a power to adopt one of the brother's sons within 10 years after the testator's death and accordingly the adoption made more than 11 years after was invalid—Bhupendra Mohan v. Putna Sashi 43 C W.N. 1149

A Hindu testator directed by his will that after his death his widow should enjoy the income of his estate during her histime and carry on its administration in consultation with his brother and that only after her death would the said brother get the property as full owner. A surt was brought by the widow against the brother for possession of the property and the brother having deed during its pendency the executors to his estate were substituted as his legal representatives. It was held that the contemplation of the will was that the widow should be in possession of the estate and realize its income and having regard to the death of the brother whose executors could not represent him in

the management the widow was entitled also to manage the property by herself

-Nathu Ramu v Gangabas 42 CWN 1082 (PC)

81 Construction of words—If technical words are used by the testator he will be presumed to employ them. in their legal sense unless the text contains a clear indication to the contrary—Lane v Lord Stanhope 6 TR 352 (per Lord Kenyon) Phillips v Gatth 3 Bro C C 68 (per Buller J) Buck v Norton 1 Boo & Pol 57 (per Eyre CJ) Smith v Butcher 10 Ch D 113 (116) Re Sintee 11913] 1 Ch 552 II words of art are used, they are construed according to the technical sense unless upon the whole will it is plann that the testator did not so intend—per Lord Alvanley in Thellusson v Wood find 4 Ves 329 Jesson v Wright 2 Bligh 1 (per Lord Redesdale) Towns v

Wentworth 11 Moo P C 543 (per Lord Kingsdown) Therefore Courts have no right or power to say that the testator did not understand the meaning of the words he has used or to put a construction upon them different from what has been long received or what is affixed to them by the law-per Buller J in Hodgson v Ambrose Doug 341 When highly technical expressions are used in an instrument it is not po sible entirely to ignore the construction placed on such technical expressions by eminent and learned Judges in the Courts of Chantery in England because it must be assumed that the technical expressions employed have been employed with the meaning and significance generally believed to attach to them in the particular branch of the law-Adans v 1111s Gray 48 MLJ 707 90 IC 5 AIR 1925 Mad 599 (600) I do not say that a testator who writes his own will and is not a lawyer is in all cases to be held to have rightly apprehended the meaning of technical words which he may have used on the occasion of making his will. But I think it is plain that a testator who uses words which have an intelligible conventional meaning is not to be held as having used the words with any other meaning unless the context of the instrument shows that he intended to do so -per Lord Watson in Hamilton V R chie [1894] AC 310 (313) In construing the will the rule is to read it in the ordinary and trammatical sense of the words unless ome obvious absurdity or some repurnance or inconsistency with the declared intention of the writer to be extracted from the whole instrument should follow from so reading it-per Lord Wensleydale in Abbott v Middleton (1858) 7 H L C 68 (114)

Where the language in which a deed is written is not the language of trained draftsman or a killed conveyancer but the draft is prepared by a mateur or layman all that is necessary to interpret such a deed is to give it plain meaning to the words used neglecting grammatical errors and remember—the limitations and deficiencies of the draftsman—Ganga Baksh v Gokil Prace 4 OLJ 744 44 IC 645. The sound principle of construction is that where the language of a will is sound and Consistent it shall receive its literal construction unless there is omething in the will riself to suggest a departure from it. An therefore the clear words of a will must be construed in their literal meaning it the context in which they occur when there is absolutely nothing on the fact of the will to suggest any secondary meaning. The clear expression used in a will object to be given any conjectural emendation in order to suit the text which have happened—Gurusami v Sivolami 18 Mad 347 (358) (PC) Last

There are two cardinal principles in the construction of wills deed and other documents The first is that clear and unambiguous dispositive words are not to be controlled or qualified by any general expression of opinion. second is that technical words or words of known legal import must have their effect even though the testator uses inconsistent words unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense—Lalit Mohin v Chukkut Lal 24 Cal 834 (846) (PC) following Doe d Gallini V Gallini 5 B & td 621 Mary Hilson V George Oakes 31 Mad 283 (303) Jesson v Hinekl Bligh 56 (57) It is possible that the testator may have imperfectly under s ood the words he has used or may have misconceived the effect of conferns a bentable estate but this would not justify the Court in giving an interpretation to the language other than the ordinary legal meaning—Lalit Mohin v Chukha Led 24 Cal 831 (850) But where the intention of the testator is plain, it be allowed to control the keal operation of words however technical-1 auth xf · Bell Madd. & Geld, 343

Primarily the words of the will are to be considered. They convey the expressions of the testator's wishes but the meaning to be attached to them may be affected by surrounding circumstances and where this is the case those circumstances must no doubt be regarded. Amongst the circumstances thus to be regarded is the law of the country under which the will is made and its dispositions are to be carried out. If that law has attached to a particular word a particular meaning or to a particular disposition a particular effect it must be assumed that the testator in the dispositions which he has made had regard to that meaning or to that effect unless the language of the will or the surrounding circumstances displace that assumption -Sootjeemoney Dossee v Denobundoo Mullick 6 M I A 526 (550) In the case of a vernacular will drawn up and executed in the mofussil the Court should take care not to apply wholesale the principles of construction which are applicable to wills executed in the Presidency Towns and drawn up by Solicitors or Valuls In construing a will of this kind the intention of the testator is to be gathered from the tenor of the whole will and artificial rules of construction should not be applied without due regard to the habits prejudices and customs of the people among whom the testator lived and the circumstances under which the will came to be executed-Manikam v Venkatesa 99 I C 705 A I R 1927 Mad 494 (495) In construing the wills of Hindus sufficient regard must be had to the prejudices habits and customs prevailing among them-Ibid Suaminatha v Durgisami 101 IC 82 AIR 1927 Mad 681 (682) To search and suft the heaps of cases on wills which cumber our English Law Reports in order to understand and interpret wills of people speaking a different tongue trained in different habits of thought and brought up under different conditions of life seems almost absurd In the subordinate Courts of India such a practice if permitted would encourage litigation and lead to idle and endless arguments -per Lord Macnaghten in Norendra v Kamalbasını 23 Cal 563 (572) (PC)

Moreover it is dangerous to construe words of one will by the construction of more or levs similar words in a different will which was adopted by the Court in another case—Sassman v Shib Narayan 1 Pat. 305 (PC) AIR 1922 PC 63 26 CWN 425 65 IC 193 Bhupati Charan v Chandi Charan 39 CWN 390 Kamakhya v Kushal Chandi 38 CWN 477 To construe one will by reference to expression of more or less doubtful import to be found in other wills is for the most part in unprofitable exercise Happily that method of interpretation has gone out of fashion in England. To extend it to India would hardly be desirable—per Lord Macnaghten in Novendra v Kamalbasim 23 Cal 563 (672) (PC).

A clause of defeasance in a will in order to be operative must contain express words or words of necessary implication of a gift over to a definite person. A testator beque. The defeated here are the strength of them of the died childless before attaining majority the other two would get his share there was also a provision that the legaces would be distributed when all of then attain majority and if at that time any of them was not living his share would revert to the legacy of a certain other person. There was a further provision that if any of the persons A B C died leaving a childless widow then such widow should get a maintenance allowance. After the attain ment of majority of A B and C A died leaving a childless widow. Held that the lat clause had not the effect of divesting the property obtained by A and his widow was entitled to the property as the heir—Chandidas v. Maina Bala 41 C WN 4322.

82 Intention of the testator —In interpreting a will regard must be had not merely to the words used but to the evident intention of the testator —Taran Singh v. Raminatan 31 Cal 89 (39). "The first 'principle to be borne in mind in regard to the construction of wills is that as far as possible the real minention of the testator as expressed in the will should be gathered and accuration and given effect to \_The so called rules of construction to be found in such abundance more especially in English decisions are merely aids to enable us to discern or discover the real intentions of the testator and should not be allowed to overrule in any case the expressed intentions of the testator Rules of construction are only intended to aid us where there is ambiguity and not be enable us to get rid of the express words of the testator if expressed in clear language.—Adams v. Mrs. Gray. 48 M.L.J. 707 A.I.R. 1925. Mad. 599 (600) 90 I.C.5. Dinbar v. Nusseriu any. 49 Cal. 1005 (1008) (P.C.). See also Soonit money v. Denobundoo 6 M.I.A. 526 cited ante.

Where the terms of a will are clear it is not proper to rely upon artificial rules of construction for the purpose of arriving at the intention of the testator Where such intention can be gathered from the will itself, the Court is n bound to go beyond the four corners of the will-Manikam v Venkalesa 99 IC 705 AIR 1927 Mad 494 (496) The intention of the testator must be collected from the words employed by himself in the will and no surmise or conjecture of any object which the testator may be supposed to have had in view can be allowed to have any weight in the construction of his will unless such object can be collected from the plain language of the will itself-Scarborough v Doe d Sa ! (1836) 3 A & E 897 (962) Abbott , Middleton (1858) 7 HLC. 68 (114), Ram Prasad v Basantia 6 PLT 615 89 IC 1009 AIR 1925 Pat. 729 Srinibash v Monmohini 3 CLJ 224 Gwillim v Gwillim 5 B & Ald 123 (per Park B) Aghore v Kamini 11 CLJ 461 6 IC 554 (561) Mary II ilson v George Oakes 31 Mad 283 (303) Dunbas v Nusserwans 49 Cal. 1005 (1008) (PC) Shore v Wilson 9 Cl & F 355 Smith v Lucas 18 Ch D 531 No doubt the intention of the testator is to be the guide but such intention is to he sought in his words a rigorous attention to the intention of the testator is apt to lead the mind insensibly to speculate upon what the testator may be supposed to have intended to do instead of strictly attending to the true question which is what that which he has written means-Williams on Executors (11th Edn.) Vol II p 841 If the provision made in a will clearly falls within any of the rules laid down in the Succession Act that rule must be applied without speculating on the intention of the testator-Norendra v hamalbasing 23 Cal 563 (572) When the language of the will is perfectly unambiguous and definitely precise the Courts are not justified in straining it for the purpose of giving effect to some supposed intention of the testator which is neither expressed nor emplied by the terms of the will-Frances George v Helena George 6 NWP 219 If there be no ambiguity however unfortunate it may be that the intertion of the testator shall fail there is no right in any Court of justice to sa) that those words shall not have their plain and unambiguous meaning. Earl of Hard uicke v Douglas (1840) 7 Cl & Fin 795

In construing will care should also be taken that the construction placed upon one part of the will is not repugnant to the clear intention appearing in another part—Mamkam v Venhates 99 IC 705 AIR 1927 Mad 494 (4%)

The testator must not be presumed to intend absurdit; i nevertheless, if shown by the context or by the whole will to have so intended the intention if not illegal must be carried out—Rhodes v Rhodes 7 App Cas. 192 If the word used are unambiguous, they cannot be departed from merely because they lead

to consequences which may be considered capricious or even harsh-Abbott v Middleton (1858) 7 H.L.C. 68 21 Beav 143

Lastly the testator must not be presumed to have intended to due intestate Intervents in the will as capable of two interpretations according to one of which the will can have no effect whatsoever and according to the other some of the provisions of the will may be carried into effect the Court vill adopt the first interpretation. One of the cardinal rules of construction applicable to wills is that the Court will lean against intestacy and will not presume that the testator meant to die intestate if on a fair construction there is no reason for saying the contrary—Ank Smith v Pariell [1903] 1 Ch 483. There is one rule of construction which to my mind is a golden rule viz that when a testator has executed a will in solerm form you must assume that he did not intend to make it a solerm farce that he did not intend to die intestate when he has gone through the form of making a will. You ought if possible to read the will so as to lead to a testacy not to an intestacy—per Lord Esher M.R. in In re Harisson (1883) 30 Ch.D. 390 (383).

Defeasance clause and Repugnant clause —The distinction between a difeasance clause and a repugnant one is sometimes a nice one. One useful test has been formulated by the Madras High Court in the case of Goundaraja Pillai v Mangalam Pillai 63 M LJ 911. Where the intention of the donor or testator is to maintain the absolute estate conferred on the donee but he adds some restrictions in derogation of the incidents of such absolute ownership the clause is a repugnant one and is therefore void. If however the intention expressed or to be necessarily implied is to extinguish the absolute estate on the happening of a contingency and the effect of the termination of the said estate would not be the volation of any rule of law the clause is a defeasance clause and would operate according to its tenor.

The exclusion by a subsequent clause of some of the heirs or only a class of heirs of the dones or legatee who has been given an absolute estate an estate of inheritance would not make the clause a defeasance clause but only a repugnant one for a hentable estate must descend according to the law of the land or the personal law of the donce or legatee as the case may be and any provision made for excluding some of the heirs at law of the donee or legatee or a particular class of them would be regarded as an attempt by the donor or testator to legislate which cannot be permitted. The principle is well established and has been illustrated by the Judicial Committee in recent times in the cases of Raghunath Prasad Singh v Deputy Commissioner Partabgath 56 I A 372 51 CL J 16 and Sarajubala Debs v Jostsmoyes Debs 58 IA 270 54 CLJ 393 The intention to terminate a gift or a bequest may be an expressed one or may be inferred by necessary implication. Where it is an absolute one-an estate of inheritance having been conferred on the donce or legatee-and the contingency is one which is to happen if at all the moment the donce or legatee dies and not earlier that intention would be necessarily implied if at that moment of time the donee's or legatee's absolute interest is cut down by the words used by the donor or testator to a life estate for with his death (se of the death of the donee or legatee) all his interest determines nature doing the final act. An absolute estate so conferred can only where there are no express words of conversion into a life estate be cut down to a life estate if the quality of heritability be destroyed and that can be done by the exclusion of all the heirs of the donee or legatee then

A gift over is not the sine qua non of a deleasance clause. There can be a deleasance simpliciter in the case of Golak Behan Mondal v Suradhans

Dassi 68 CLJ 246, Mitter J observed A clause would be a defeasance clause if on an expressed contingency happening the testator had indicated therea to determine a bequest-may be a limited or an absolute one-made to one in the earlier part of the will There may be the termination of that bequest with or without a gift over and in the latter case the bequest so terminated would either fall into the residue or if the bequest so terminated he itself the residuary one testator's heir at law would step into the void. Where however there is a gift over the intention to determine the prior bequest is patent but where there is none it may be in some cases a question and a serious or a difficult one if the testator did intend an extinguishment of such bequest I am accordingly of opinion that it is a misconception that a gift over is sine qua non the essence of a defeasance clause and cannot accordingly subscribe to the views expressed in - Amulya Charan Seal v Kals Das Sen 32 Cal 861 or in Chandidas Sinha Malina Bala Sinha 41 CWN 432 In Bhoobun Mohini Debia v Humis Chunder Chowdhury 5 I A 138 4 Cal 23 there was no gift over on the contingency of kasiswari dying without issue of her body and still Sir Robert Collect said that the clause in question if the contingency had happened would have operated as a defeasance clause and the estate would have reverted to the door and his heirs In Kristoramaney Dassi v Maharaja Narendra Krishna 16 I A a 16 Cal 383 Lord Hobhouse in dealing with the will of a Hindu gave indications at page 39 of the report that a defeasance of a prior bequest may be a defeasant simpliciter—in that case all that is required is that the contingent event must happen if at all on the close of a life in being at the time of the gift-and secondly there may be a defeasance by gift over in which case the gift out must be in favour of somebody in existence at the time of the gift This last limitation in the case of a Hindu donor or testator was made on the basis of the rule laid down in the Tagore case 18 WR 359 which rule has been altered in 1916 by the Legislature by the Hindu Disposition of Property Act (NV of 1916) If the view expressed in the case of Amulya Charan Seal 32 Cal 801 and Chandidas Sinhas case 41 CWN 432 was correct section 134 of the Indian Succession Act would be a redundant one and would have to be discarded in the view of the fact that cases of gift over are provided for in section 131

Jurisdiction of Court to construe Will -It is well settled that the jurisdiction of a Court to construe a will is incidental to the power which the Court possesses of administering the estate left by the deceased as all of the power which the Court possesses to enforce the trusts if any created by the will It has been maintained that the jurisdiction to construe wills is and necessarily connected with or dependent upon the jurisdiction to administration to a the estate or to enforce the trusts and that such jurisdiction arises wholl) for the complicated character of the provisions in the will from the difficulty of understanding their meaning or the doubt and uncertainty as to the rights and interests of the parties claiming under them—Pomeroy on Equity Junsprudied Secs. 1155 to 1157

Inquiries to determine questions as to object or subject of will

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For the purpose of determining questions as to what person or what property denoted by any words used in a will Court shall inquire into ever

material fact relating to the persons who claim to be interested under such will the property which is claimed as the subject of disposition, the circums

tances of the testator and of his family, and into every fact a knowledge of which may conduce to the right application of the words which the testator has used

#### Illustrations

(i) A by his will bequeaths 1 000 rupees to his eldest son or to his youngest grandchild or to his cousin Mary A Court may make inquiry in order to ascer tain to what person the description in the will applies

(ii) A by his will leaves to B my estate called Black Acre It may be necessary to take evidence in order to ascertain what is the subject matter of the

bequest that is to say what estate of the testators is cilled Black Acre
(m) A by his will leaves to B the estate which I purchased of C

(iii) A by his will leaves to B the estate which I purchased of C It may be neces any to take evidence in order to ascertain what estate the testator purchased of C

Note —This section applies to Hindus Buddhists etc. see Sec. 57 and Sch. III. For construction of this section, see Sch. III. para. 5

83 Principle —This section deals with the admissibility of extrinsic evidence in aid of interpretation of wills. It may be stated as a general proposition that a Court may inquire into every material fact relating to the person who claims to be interested under the will and to the circumstances of the testator and of his family and affairs for the purpose of enabling the Court to identify the person intended by the testator —Williams on Executors (11th Edn.) Vol II p 909

Thus there is no rigid rule which forbids inquity as to who is the person to take the benefit even where a legatee is accurately named in the will-National Society v Scottish National Society [1915] AC 207 For the purpose of ascertaining the persons intended to be benefited evidence is admissible of the state of the testator's family and of his relations with the various persons who claim to be benefited by the will and also evidence of the names by which he habitually called certain persons whether proper names or names indicating relationship maccurately applied-Drake v Drake 8 HLC 172 Lee v Pain 4 Hare 251 Charter y Charter LR 7 HL 364 So in the case of a devise to Mrs C evidence was admitted to show that the claimant of the legacy was a person whom the testator was in the habit of calling Mrs C - 104/1 1 Massie 3 Ves 148 So also where the legatee was named by his surname only and the Christian name was not mentioned evidence was admissible to prove the individual intended and to establish that the testator was in the habit of calling the claimant by the surname only-Price v Page 4 Ves. 680 If no one fully answers the name or description of the legatee under the will the Court will receive evidence in order to ascertain whether there exists any person to whom the name or description can be reasonably and with sufficient accuracy applied-In the goods of Brake 6 PD 217 But a testator cannot be taken to have meant to benefit a person of whose existence he was not aware even if the person fully answes to the description in the will-Deo d Thomas \ Benjon 12 Ad & E 431

Admissibility of evidence —In.order to show what things a testator intends by\_a specific description all the circumstances-relating to.his property material to identify the thing described are admissible in evidence—Throbald on Wills 6th Ed. p. 129. All facts relating to the subject matter of the devise such as that it was or was not in the powersion of the testator the mode of acquiring it the local situation and the distribution of the property are admissible to aid in ascertaining what is meant by the words used in the will—Doe d. Temflerian V. Martin 4 B. & M. 77. (788)

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Misnomer or misdescription of object

(1) Where the words used in a will to designate or describe a legatee or a class of legatees sufficiently show what is meant, an error in the name, or

description shall not prevent the legacy from taking effect. (2) A mistake in the name of a legatee may be cor rected by a description of him, and a mistake in the description of a legatee may be corrected by the name

#### Illustrations

(1) A bequeaths a legacy to Thomas the second son of my brother John The testator has an only brother named John, who has no son named Thomas but has a second son whose name is William. William will have the legal,

(ii) A bequeaths a legacy to Thomas the second son of my brother John testator has an only brother named John whose first son is named Thomas and whose second son is named William Thomas util have the legacy (iii) The testator bequeaths his property to A and B the legitimate children of C C has no legitimate child but has two illegitimate children A and B the legitimate children A and B the legitimate children A and B the second control of the second control The bequest to A and B takes effect although they are illegitimate

(iv) The testator gives his residuary estate to be divided among my sna children and proceeding to enumerate them mentions six names only the mission will not present the children than the control of the children and proceeding to enumerate them mentions six names only the mission will not present the control of the children than the children than the children than the children that the children than the children that the children than the children that the children than the children that the children than the

omission uill not prevent the seventh child from taking a share with the others (t) The testator having six grandchildren makes a bequest to my grandchildren and proceeding to mention them by their Christian names not tuons one twice over omitting another altogether. The one whose name is soft mentioned and table a behavior with the actions of the control of the contro

(vi) The testator bequeaths 1000 rupees to each of the three children of At the date of the will A has four children Each of these four children it has some or the summer of the summer mentioned will take a share with the others

will if he survives the testator receive a legacy of 1000 rupees.

Note —This section applies to Hindus Buddhists etc see sec. 57 and Sch III For construction of this section see Sch III para 5

Mistake in name or description — The general rule upon this subject is that where the name or description — Ine general rule of a legater is erroneous, and there is no reasonable doubt as to the person who was intended to be named of described the mistake shall not disappoint the bequest The error may be rectified and the true intention of the testator ascertained in two ways (1) by the context of the will and (2) to a certain extent by parol evidence Williams on Executors (11th Edn.) Vol II p 907

The mistake may be rectified by the context thus an error in the name of the legatee may be obviated by the accuracy of his description—Camoji Blundell (1848) 1 H L C 778 Blundell v Gladstone I Phill C C 279 (288) Feltham's Trust 1 Kay & J 528 Adams v Jones 9 Hare 485 Hodgson v Clarke 1 DeG F & J 391 Re Nunns Trust LR 19 Eq 331 Similarly at error in the description may be obviated by the certainty of the name This where a testator gave his estate to Venkata Surya my aurasa son known that Venkata Surya was not his aurasa son and it was alleged that the mir description was purposely made with intent to defeat the right of a son already adopted it was held that the legatee was entitled to take under the will into pective of his claim to the title of son since it was clear that he was the period designata. If there is an adequate description of the person intended to take the erroncous addition of words of description is immaterial. A fortion it midbe a where the testator knowing the person who is to take misdescribes had for some reason or other—Court of Wards v Venkata Surya 20 Mad. 167 (187)

affirmed Sn Raja v Court of Wards 22 Mad 383 (391) (PC) The rule lalsa demonstration non notest means that if there be an adequate and convenient description with convenient certainty of what was intended to pass or who was meant to be legatee a subsequent erroneous addition will not vistate it—Webber v Stanley (1864) 16 C B.N.S 755 The six Illustrations of this section are respectively taken from Stockdale v Bushby 19 Ves. 381 Neubolit v Price 14 Sim. 354 Standen v Standen 2 Ves. 589 Garth v Mejnick 1 Bro C C 30 Edddis v Johnston 1 Giff 22 and Gartey v Hibbert 19 Ves. 124

85 Legacy to a person in a particular character — With respect to legacies given to persons in particular characters, the rule is that where there is no doubt as to the person intended the misdescription of character shall not frustrate the bequest. Thus a woman may take a legacy by the name of the wife of such a one although she be not a lawful wife if she be reputed or known by that name—Giles v. Giles 1. kcen 685. Doe v. Reuse 5 CB 422. Re Petts 27 Beas 576. Re Wagstaff [1998] 1 Ch. 162. Indar Singh v. Gurden AIR 1830. Lah 830 (832) 126 1 C 565. Where the testator who was betrothed to a lady and intended to marry her in a few days made a coducil in her favour describing her as his wife but died before marrying her it was held that the lady was entitled to the legacy—Schloss v. Stiebel (1833) 6 Sun 138 RR 67.

In India questions of this nature frequently arise in case of bequest to an adopted son. Thus where in a will there was a clear indication of the testator's intention before making an adoption to give the greater part of his property to a boy whom he was about to adopt and the bequest was by name and not dependent on the adoption held that the bequest to that boy was effectual whether there was adoption or not or whether the adoption was valid or not-Bireswar v Ardha Chandia 19 Cal 452 (461 462) (PC) Subbarayar v Subbammal 24 Mad 214 (218) (PC); Nidhoomans v Saroda 3 I A 253 (PC) In the absence of anything in the will to show that the fact of the adoption of the devisee was the motive or the reason for the gift the language of the gift was to be interpreted in its ordinary meaning as a gift to the boy as a persona designate who was entitled to take under the will as the object of the testator's bounty even though the adoption was not proved or was not valid-Lalta Prosad v Salig Ram 31 All 5 (6) 5 ALJ 626 Murars Lal v Aundan Lal 31 All 339 (342) 6 ALJ 411 Thus one N who had no children of his own brought up in his house one h, who was the son of his wife's brother from his boyhood provided for his marriage, and then made a gift of the bulk of his property to K. Since that time K had been helping N in his business and hving jointly with him Afterwards by a will N gave the rest of his property to K and in that will K was described as the adopted son of N Held that the fact of L being the adopted son of N was not the sole motive of making the will but that N meant to leave the property to A because he was his relative and had been living with him for so many years and was the object of his affection. The bequest to K was therefore valid although he was not the adopted son of N-Khub Singh v Ramp Lal 41 All 666 (669) 52 IC 311 17 ALJ 853 Similarly if a testator made devise to my wife Gurdevi there is nothing in the will to show that the mantal tie between the testator and Gurdevi was the motive or reason for the bequest it must be interpreted as a bequest to Gurdevi as a persona designata who is thus entitled to take under the will although her marriage with the testator be not proved-Indar Singh v Gurder: AIR 1930 Lah 830 (832) 126 IC 565

But where a brquest is made to a person in a certain character which may be presumed to be the motive of the testator's bounty such person cannot take on 64

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the legacy unless he fills that character Thus where the mention of the done or the devisee as the adopted son was not merely descriptive of the person to take under the gift or will but the assumed fact of his adoption was the reason and motive of the gift and indeed a condition of it the gift or legacy could not take effect if the adoption was invalid or did not take place-Faminda v Rajeswar 11 Cal 463 (483 485) (PC) 12 I A 72, Lali v Murlidhar 28 All 488 (496) (PC) 3 ALJ 415 Probodh Lal v Harish Chandra 9 CWN 309 (318) Karamsı v Karsandas 20 Bom 718 (720) affirmed 23 Bom 271 (278) (PC) Doorga Sundan v Surendra 12 Cal 686 (694), Abbu v Kuppamra 16 Mad 355 (359)

The distinction between what is description only and what is the reason of motive of a gift or bequest may often be very fine but it is a distinction which must be drawn from a consideration of the language and the surrounding or

cumstances-Fanndra v Rajeswar 11 Cal 463 (484) (PC)

Where any word material to the full expression of the meaning has been omitted, it When words may be may be supplied by the context supplied

### Illustration

The testator gives a legacy of five hundred to his daughter A and a legacy of five hundred rupees to his daughter B A util take a legacy of five hundred rupees This section applies to Hindus Buddhists etc. see Sec 57 and Sch. III.

Words omitted may be supplied ...In construing a will where there are obvious omissions due to careless or hasty drafting the Cour would be justified in supplying such omissions as the dispositions in the will would justify—Suammatha v Duraisami 101 IC 82 AIR 1927 Mad 681 (68) In this case certain words such as manage or enjoy which were omitted in the will were supplied by the Court Where it is clear on the face of a fill that the testable has that the testator has not accurately or completely expressed his meaning by the words he has used and it is also clear what are the words which he has omitted these words may be supplied in order to effectuate the intention as collected from the context —Jarman on Wills 6th Edn Vol I p 581 Mrs De Crut Nagish 29 LW 1 114 IC 837 AIR 1929 Mad 64 (66) I am not to be deterred by any accidental omission from putting the true signification of the will and I would be going against the canon of construction if I am not by substitute what some blundering attorneys clerk or law stationer has writes in this will and break the control of the stationer has writes in this will and treat this blunder as if it was the intention of the testator do not therefore benefit and do not therefore hestate in the slightest degree to adopt the rule which list V C expressed in Succession 2000. V C expressed in Suceting v Prideaux (1876) 2 Ch D 413 that the tistad must necessarily have meant what the mere letter of the will does not express -per Bacon VC in In re Redfern (1878) 6 ChD 133 Mellor Daniel To my son dural his life and on his demise to his children but in case of my son dairg belot his mother to the children of my daughters the words without leaving of child were supplied after the words dying before his mother —Abbell ( Middleton (1888) 7 H L C 68 So also in order to be consistent with an about gift on the son's attaining majority the words if my son dies in a promise the will were interpreted to mean if my son dies before attaining majorif-Tara Churn v Suresh Chunder 17 Cal 122 (PC) So also the word do a in the expression subject nevertheless to the trust of maintainin, m) c

daughter was held to be qualified by the words in case she were otherwise unprovided for - Varayani v Administrator General 21 Cal 683 (696) Where a testator left a property to his son T and directed that if in case T dies his wife shall be entitled to maintenance and all the brothers shall be owners of his property in equal shares held that the above words should be construed as in case T dies uithout issue before me etc -Udho Singh v Mehr Chand 141 PR 1916 38 IC 652 (653)

See also the Notes under the next section

Changing words and Supplying words -It is a well known principle of construction that no part of a will should be discarded and the will as a whole should be construed. An attempt should be made to reconcile apparent incon sistencies. When it appears from the context of a will that a certain word was incorrectly employed by the testator in place of some other word the Court will change the word to give effect to the intention of the testator as gathered from the whole of the will Cases occur in which or is incorrectly used for and and tice tersa. In some cases on the context of the will and has been read or so as to vest a gift in alternative in her of cumulative events-Jackson v Jackson 1 Ves Sen 216 Haues v Haues 1 Ves Sen 13 The Court had changed the word fourth into fifth where it became clear upon the construction of the whole will that the testator intended to refer to the fifth and not to the fourth schedule-Hart v Tulk 2 D M & G 300

With regard to supplying words in a will the rule seems to be that where the will as it stands is clearly inconsistent, so that the choice lies between rejecting some portion of it or supplying some word while at the same time the latter course will make the will consistent the Court will be justified in making the necessary addition See Hope v Potter 3 h & J 206 Phillips v Rail 54 W R

517 -Theobald on Wills 9th Ed p 637

If the thing which the testator intended to be- Section 65 queath can be sufficiently identified Act X of Rejection of erroneous particulars in description from the description of it given in the 1865 of subject will, but some parts of the description

do not apply, such parts of the description shall be rejected as erroneous, and the bequest shall take effect

#### Illustrations

(i) A bequeaths to B my marsh lands lying in L and in the occupation of X. The testator had marsh lands lying in L but had no marsh lands in the occupation of X. The words in the occupation of X. Shall be rejected as erro neous and the marsh lands of the testator lying in L will pass by the bequest (ii) The testator bequeaths to A my zamindari of Rampur. He had an estate at Rampur but it was a taluq and not a zamindari. The taluq passes by

this bequest

Note ... This section applies to Hindus Buddhists etc. see sec 57 and Sch III

Secs 77, 78 -To effectuate the clear intention as apparent upon the whole will a clerical error may be corrected where if uncorrected it makes the will absurd and where the proper correction can be gathered from the context .- Re Northen's Estate 28 Ch D 153 Re Dayrell [1904] 2 Ch D 496 Re Mayell [1913] 2 Ch D 488 So also words may be supplied or rejected-Doe v Micklem v East 486 493 494 Kirkbatrick v Airkbatrick 13 Ves 476 Abbott v Middleton, 21 Beav 143 Jesson v Wright 2 Bligh 1, Sherrot v

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Bentley 2 Myl & K 149 If upon a consideration of the whole will and all the circumstances the Court could clearly ascertain the intention of the testator that intention would determine the sense in which the particular words are to be read and if it be impossible to reconcile any words with that intention, the Court will reject them and if any particular word is wanting to express the intention the Coart will supply it-Maneku v Nanabhas 53 Bom. 724 31 Bom LR 969 AIR 1930 Bom 33 (36) 120 IC 842

But a mistake in a will cannot be corrected or an omission supplied unless it clearly appears by fair inference from the whole will-Phillips v Chambeilari 4 Ves 57 Dent v Peps Madd & Geld 351 Moreover the rule is that words in a will are not to be rejected or supplied unless there cannot be any rational construction of the words as they stand (Chambers v Brailsford 19 Ves 654) and unless the rejection or insertion is necessary to carry out the mamilest intertion of the will-Sweeting v Prideque (1876) 2 Ch D 413 But words cannot be rejected or supplied on mere conjecture. Words and limitations may be supplied or rejected when warranted by the immediate context or the general scheme of the will but not merely on a conjectural hypothesis of the testators intention however reasonable in opposition to the plain and obvious sense d the instrument—Abbott v Middleton (1858) 7 HLC 68 (114) In construct a will words cannot be added to give effect to what may be fanced to have been the intention of the testator-Gopal Krishna v Ramnath 5 Bom LR 79

79 If a will mentions serveral circumstances as des criptive of the thing which the testator

When part of descrip-tion may not be rejected as erroneous

intends to bequeath, and there is any property of his in respect of which all those circumstances exist, the bequest

shall be considered as limited to such property, and it hall not be lawful to reject any part of the description as erroneous, because the testator had other property to which such part of the description does not apply

Explanation -In judging whether a case falls within the meaning of this section, any words which would be liable to rejection under section 78 shall be deemed to have been struck out of the will

#### Illustrations

(1) A bequeaths to B my marsh lands lying in L and in the occupied of X. The testator had marsh lands lying in L some of which were in occupation of X and some not in the occupation of X. The bequest all two considered as limited to such of the testator's marsh lands lying in L as ref. in the occupation of X.

in the occupation of X (ii) A bequeaths to B my marsh lands lying in L and in the occupation of X comprising 1000 bighas of lands. The testator had marsh lands lying L some of which were in the occupation of X and some not in the occupation of X The measurement is wholly mapplicable to the marsh lands of other class, or to the whole taken together. The measurement will be considered in struck out of the will and such of the testators marsh lands lying in L is were in the occupation of X shall alone pass by the bequest.

This section applies to Hindas, Buddhists etc ace see at Sch. 111

The principle of this section is that where a given subject is devised and the e are found two species of property the one technically and precisely corresponding to the descript on in the device and the other not so completely answer ing thereto the latter will be excluded though had there been no other property on which the devise could have operated it might have been hild to comprise the less appropriate object - Jarman on Wills, (5th Fdn.) Vol 1 p 740 Certain property described as he mg in the testator's separate possession and specifically described as gala sattes was bequeathed to the appellant. The testator was entitled to certain sharelat futtis in the village which bore different numbers from those specifically given. These shandar pattis were o sned by proprietors of ests patter in common. The will contained no words as with the appurten ances or lands appurtaming thereto. Held that as the asla pattis precisely corresponded to the description given in the will and the slamlat pottis in no way answered to that description the latter were excluded-Tulska v Mathura tun 7 ALJ 1093 6 IC 791 (795)

Where the words of a will are unambiguous, but section 67. it is found by extrinsic evidence that Act of Extrasse evidence adthey admit of applications one only of russible in case of latent

ambiguit) which can have been intended by the testator, extrinsic evidence may be taken to show which of these applications was intended

#### Illustrations

(1) A man having two courses of the name of Mary bequeaths a sum of money to my course Mary. It appears that there are two persons each answering to the description in the will. The description therefore admits of two applications, only one of which can have been intended by the testator. Evidence i admissible to show which of the two applications was intended in a different party of the many of the

to show which estate was intended

Note -This section applies to Hindus, Buddhists etc; see sec 57 and Sch III It may be compared with sections % % and 97 Indian Evidence Act.

Extrinsic evidence -Where an ambiguity arises, from the admission of extrinsic evidence as to which of two or more things or which of two or more persons, each answering to the description in the will the testator meant to designate evidence of the testator's declarations can properly be admitted-

Miller v Travers 8 Bing 244 Dea v Hiscocks 5 M & W 363

But no extrinsic evidence of the intention of the testator is admissible where the intention can be gathered from a proper consideration of the will. Thus a talugdar died childless leaving two widows, and bequeathed to the Maharani Sahiba his entire estate and gave a power to the same to adopt a son to him providing maintenance for both his widows after such adoption. The question arose as to whether the word Maharam Sahiba referred only to the elder or to both of the testator's wives. Held on a consideration of the will that as the testator intended single heirship and the whole state of things pointed to the owner of the estate being one and the donce of the power to adopt was only one the word. Maharam Sahiba, was not here used as a collective term for both widow but ignified only the elder. This is not a case in which it would be proper o admit extrinsic evidence of the testator's intention. It is rather a case in which the difficulty created by the particular expression ought to be

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solved by adopting the construction which be-peaks a reasonable and probable intention and rejecting that which would indicate an intention unreasonable, capricious and inconsistent with the testator's views as evidenced by his conduct and by the dispositions of his will which are not open to controversy-Inda Kunuar \ Jaspal Kunwar 15 Cal 725 (749) (PC)

Extrinsic evidence in admissible in case of patent ambiguity or de ficiency

Where there is an ambiguity or deficiency on the face of a will, no extrinsic evidence as to the intention of the testator shall be admitted

#### Mustrations

(1) A man has an aunt Caroline and a cousin Mary and has no aunt of the name of Mary By his will be bequested 1000 rupees to my and. Caroline and 1,000 rupees to my cousin Mary and afterwards bequest 5000 rupees to my before the most of the description given in the will can apply and evidence is not admisst show who was recent for the most of the m show who was meant by my before mentioned aunt Mary therefore void for uncertainty under section 89 leaving a blank for

the name of the legatee Evidence is not admissible to show what name the

testator intended to insert rupees or my estate of Evidence is not admissible to show what sum or what estate the testator intended to insert

Note —This section applies to Hindus Buddhists etc see Sec 57 and to insert Sch III It may be compared with sec 93 Indian Evidence Act

The mere circumstance that blank spaces are left in the body of a will is no objection to its being a valid will—Pandurang v Vinayak 16 Bon-652 (655) But where a complete blank is left for the devisees name in a will no parol evidence however strong will be allowed to fill it up as intended by the testator-Basis v Attornes General 2 Atk 239 Muler v Travers 8 Bing 24 Clayton v Lord Nugent 13 M & W 200 If however the legatees name if not mentioned in the will but has been secretly mentioned to another person by the testator and the will contains the following clause The shares of Tala & Co should be transferred to the person whose name will be disclosed by Handis I eld that the evidence of Handas as to the private instructions given to him by the testator is admissible and shares must be transferred to the person who name was given by the testator to Handas—Bayabar V Handas 40 Bom. 1 (10) 17 Bom LR 115 For a imilar Insh case see Riordan v Banon (1876) 10 lr R Eq 469

82 Meaning of clauses to be collected from entire will

The meaning of any clause in a will is to be col lected from the entire instrument, and all its parts are to be construed with reference to each other \*

#### Illustrations

(i) The testator gives to B a specific fund or property at the death of L and by a subsequent clause gives the whole of his property to A. The effect of the several clauses taken together is to vest the specific fund or property in A feeling and after his decease in B it appearing from the bequest to B that the testator recent to use in a restricted sense the words in which he described with testator meant to use in a restricted sense the words in which he describes which he gives to &

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(11) Where a testator having an estate one part of which is called Black Acre bequeaths the whole of his estate to A and in another part of his will bequeaths Black Acre to B the latter bequest is to be read as an exception out of the first as if he had said I give Black Acre to B and all the rest of my estate to A.

Note —The words and for this purpose a coducil is to be considered as part of the will which occurred at the end of the corresponding section (69) of the old Act have been omitted obviously because they are redundant having regard to the definition of the word codicil in section 2 (b) This section applies to Hindus Buddhists, etc. see Sec. 57 and Sch. III

90 Construction must be on the whole will —The construction of a will is to be made upon the entire instrument and not merely upon disjointed parts of it and consequently all its parts are to be construed with reference to each other—Turpine v Forresher: 1 Bulst 101 Re Bedsons Trusts 28 Ch D 523 (252) Ford v Ford 6 Hare 492 (per Wigram V C) Manekh v Asiabhai 53 Bom 724 120 IC 842 A IR 1930 Bom 33 (37) So the language of a will ought to be construed with reference to the codical and it eve vers—Darley v Martin 13 C B 683 Harthley v Tribber 16 Beav 510 Chukkun Lal v Lalit Mohan 20 Cal 906 (913) In construing a will containing an ambiguity the Court may for purpose of explanation refer to a rectal in a codicii unless it is obviously erroneous—Re Venn [1904] 2 Ch 52 Skerrat v Oakley 7 TR

The will must be taken and construed as a whole and the construction of the will must be in a manner consistent with the general intentions of the testator —Mary Wilson v. George Oakes 31 Mad 283 18 MLJ 331 Md Jakub v Md Shahid Ali 25 OC 21 1922 Oudh 87 9 OL J 160 The Court should take into consideration the whole of the will and when subsequent provisions are intended to control or override the previous ones effect must be given to the intentions of the testator by coloring the subsequent provisions—Somasundara v Ganga Bissen 28 Mad 386 In construing a will the Court must look to all the clauses of the will and give effect to them ignoring none as redundant or contradictor—Shib Lekslan v Tarangen 8 CLJ 20

The Court has always carefully to consider the whole will and having regard to all the various clauses contained in it to see what is the full complete and perfect intention of the testator-O Mahoney v Burdett (1875) 1 H L 388 (per Lord Hatherles) Shookmoy v Monohan 11 Cal 684 (692) (PC) Gulban v Rustoms: 49 Bom 478 AIR 1925 Bom 282 (286) The primary duty of a Court is to ascertain the true intention of the testator from an examination of the entire will. The Court is entitled to put itself into the testator's chair as it is called and find out having regard to the language used in the different clauses when read together the true intention of the testator. Only that interpretation must be placed upon the will which is reasonable and not one which would tend to defeat his real object-Abdul Halim v Raia Saadat Ali 1 Luck 733 108 I C 817 A I R 1928 Oudh 155 (166 167) Thus where a clause in a will stated as follows with reference to certain property This is given as a gift to R A later clause provided Should R die and should he then leave a son such son shall afterwards be the owner thereof Held that the first clause taken by itself gave an ab olute estate to R (under sec 95) but that the two clauses should be read together and their combined effect was to confer only a life estate on R-Gulbaji v Rustamji 49 Bom 478 27 Bom.LR 380 95 1C 229 AIR 1925 Bom 282 (286) Administrator General v White 13 Mad 379 (381) Forke Smith v Tribhurandas 19 Bom 401 A will addressed by the testator to his wife ran as follows You shall under this will become possessor

of all my properties. You shall have the right and power to alienate by gift or sale the aforesaid moveable and immoveable properties. My daughter Hara Kumarı shall become entitled to and possessor of whatever propertie will remain after your death and she shall enjoy the same It was held, giving effect to all the words in the will that the gift to the testator's wife was not absolute, but that she took a life interest with power of alienation-Hara Kumari v Mokus Chandra 12 CWN 412 A Hindu testator provided in his will that after him his daughter should be malik with power to alienate and to enjoy the property down to her son grandson etc the daughter was to live in the te tator's house and to perform the pujas inaugurated by him and it was further provided that she should not transfer the property except in case of unavoidable necessity of for the education of her son etc. Held that though the earlier words in the will by themselves would create an absolute estate still considering all its terms it must be held that the earlier part was qualified by the provisions in the latter part of the will and that the daughter took only a life estate-Surendra \ Satol bandhu 26 CWN 893 (900) AIR 1921 Cal 408 70 IC 923

The true mode of construing a will is to consider it as expressing in all its parts whether consistent with law or not the intention of the testator and to determine upon a reading of the whole will whether assuming the limitation therein mentioned to take effect an interest claimed under it was intended under the circumstances to be conferred —Tagore v Tagore 18 WR 359 (371) (PC). A Court is to interpret a will as it finds it and the intention should be gathered from the language used in the will and not by anything extraneous to it. The whole of the will should be looked into for the purpose of coming to a conclusion as to what was meant by a particular word. It would not be right to take a single word out of its context and give it its etymological meaning—Pinasi Anmal v Serimatha All 1925 Mad 1175 86 1C 737

A will is not to be construed with literal strictness. The Courts are bound to look to all its provisions to see what the real meaning of the testiture is the will must be read as a whole and regard must be had to the wishes of the testator to be gathered from the general tenor of the document. A Hindi life a will in respect of hi self acquired property by which he expressly excited his a will in respect of his self acquired property should in the first | stand devolve on the testator's widowed daughter A who would be owner like himself but that in case of As death the testator's married daughter B would be owner of the property. A predeceased B Held that the intention of the test for was to make provision for A in the first instance for life in the elect of her predeceasing B but she was to have absolute estate only if she survived B In the event of B surviving A the will conferred an absolute estate on B Tail am and object of the testator was that the absolute ownership of the property would devolve on the daughter who survived the other—Ram Chand v Dies Chand 65 PR 1912 13 12 C 571

A Hindu left a Will in favour of his widow which provided exclusive owner of certain properties she may manage the said property afforces to deal with the property afforces of See shall be considered full owner. But a subsequent clause provided that after the death of his widow whatever property remarked by the solution of the property afforces on son but mether the widow nor the brother son s son would be entitled to sell immoveable property.

Held that the effect was that the widow was the absolute owner of the properties, and the prohibition against selling must be disregarded as repugna-

to the absolute gift to the widow-Jagat Singh v Sangat Singh 1940 PWN 385 (PC)

General words may be understood in a restricted Section 70 sense where it may be collected from Act X of When words may be

understood in restricted sense and when in sense wider than usual

the will that the testator meant to use them in a restricted sense, and words may be understood in a wider sense

than that which they usually bear, where it may be collected from the other words of the will that the testator meant to use them in such wider sense

#### Illustrations

(r) A testator gives to A my farm in the occupation of B and to C all my marsh lands in L. Part of the farm in the occupation of B consists of marsh lands in L and the testator also another marsh lands in L. The general words all my marsh lands in L. are restricted by the gift to A. A takes the whole of the farm in the occupation of B including that portion of the farm which consists of marsh lands in L

waren consists of marsh fainds in L

(m) The testator (a \_anlor on sup-board) bequeathed to his mother his
gold ning buttons and best of clothes, and to his friend A (a shipmate) his
red box classy-hine and all things not before bequeathed The testator's share
in a house does not pass to A under this bequest

(mi) A by his will bequeathed to B all his household furniture plate linen
china books pictures and all other goods of whatever hind and afterwards
bequeathed to B a specified part of his property. Under the first bequest B is
entitled only to such articles of the testator's as are of the same nature with
the articles therein enumerated

Note -This section applies to Hindus Buddhists etc. see Sec. 57 and Sch III

91 General words in one part of a will may be restrained in cases where it can be collected from any other parts of the will that the testator did not mean to use them in their general sense-Strong v Teatt 2 Burr 912 Doe v Reade 8 TR 122 Amithajan v Ketha Ramayjan 14 Mad 65 (70) It 18 a general rule of construction that where a particular class is spoken of and general words follow the class first mentioned is to be taken as the most comprehensive and the general words treated as referring to matters ejusdem generis with such class--Lyndon v Standbridge 3 H & W 51 See Illustration (iii)

A testator in a will executed in favour of his wife directed you must adopt for me a boy you like from the children that may be born in families of my brothers and then in a subsequent clause added the principal object of this will is that you should adopt for me any suitable boy held that notwithstanding the general terms of the second clau e the widow's power of adoption was restricted by the first the words suitable boy in the second clause must be interpreted as meaning such boy as I have already indicated as suitable i.e. selected out of the children born in the families of my brothers the non repetition of the words born in my brothers families in the latter clause did not indicate any change of mind on the part of the testator and therefore the adoption of a boy who did not come within the description of the first clause was invalid-Amirthayyan v hetha Ramayyar supra

The word malik ordinarily implies absolute ownership but is sometimes applied in a restricted sense to denote a person owning a life estate only. See notes under sec 95

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But in ordinary circumstances ordinary words must bear their ordinary construction and the whole will that is the whole of the words employed by the testator must be looked at together so as to determine his whole intention It is not legitimate to take words which have a general meaning and subject them to limitations which the words do not neces arily imply Thus where the testator uses the following words in a will Should either of these two sons die without leaving any male issue the survivor of the said two sons is duly to take the whole of the property the words should not be construed in a restricted sense to mean should either of these two sons die in my lifetime etc but the words should receive their full meaning and in this view they rela to death whenever it should occur whether before or after the death of the testator—Chunilal v Bas Samrath 38 Bonn. 399 (412 413) (PC) 16 BonnLR 366 18 CWN 844 Where the terms are perfectly clear to the effect that an absolute estate is given to a widow the Court cannot assume contrary to the plain meaning thereof that the testator intended to create a limited estate and then bend and twist the language in favour of the assumption so made in the face of clear and unequivocal words the construction cannot be altered or wrested from its plain meaning merely to escape from what may seem to be the hard consequences of rules of law—Sures v Laist Mohan 20 CWN 463 (467 471) 22 CL J 316 31 IC 405

Which of two pos sible constructions pre ferred

Where a clause is susceptible of two meanings according to one of which it has some effect, and according to the other of which it can have none, the former shall be preferred

This section applies to Hindus Buddhists etc. see Sec 57 and Sch. III

92 Where words are capable of a twofold construction the rule is in the case of a deed and much more in the case of a will to adopt such as tende to make it good-Athinson v Hutchinson 3 P Wms 260 (per Lord Talbol)! Thellusson v Woodford 4 Ves 312 Where the words of a will are unambiguous they cannot be departed from merely because they lead to consequences captions or even harsh and unreasonable But where they are capable of two pretations that construction of them should be adopted which is in accordant with an intelligible and reasonable and not a capricious or anomalous resilient Bathurst v Errington 2 App Cas 698 When by acting on one interpretation of the words used we are driven to the conclusion that the person using is acting capriciously without any intelligent motive contrary to the ordinary mode in which men in general act in similar cases, then if the language admits of two constructions, we may reasonably and properly adopt that which are these anomalies even though the construction adopted is not the most grammacally accurate --per Lord Cranworth in Abbott , Middleton 7 HLC 89 it difficulty created by a particular expression ought to be solved by adopting the construction which bespeaks a reasonable and probable intention and rejection that which would indicate an intention unreasonable capricious and inconsider with the testator's views as evidenced by his conduct and by other di postori in his will-Indar Kunuar v Jaipal Kunuar 15 Cal 725 (749) (PC.) I have executed this will with the consent of all m and have got them to sign it as witnesses with this very purpose so that the will may be acted upon fully and they may not quarrel among themselves at my death it was held they shall be sh my death at was held that the signatures of the sons to the will must not taken as signatures of attachman and the sons to the will must not taken as signatures of attesting witnesses, because the effect of such construct

would be to deprive the sons of their legacies (sec 67) and thus nullify the histribution of the property and defeat the object of the will but the more easonable and natural reading would appear to be that the testator's object was o secure the co operation of his sons in carrying out the dispositions of the will and the sons had appended their signatures as concurring in the dispositions contained in the will Such a construction would give effect to the testator's intention rather than frustrate it -Shiam Sundar v Jagannath 4 OWN 1205 (PC) AIR 1927 PC 248 (250) 10b IC 534

No part of a will shall be rejected as destitute of Section 72 No part rejected if it meaning if it is possible to put a Act X of can be reasonably con reasonable construction upon it strued

This section applies to Hindus Buddhists etc. see Sec. 57 and Sch. III

93 The Court is bound to give effect to every word of the will without change or rejection provided an effect can be given to it not inconsistent with the general intent of the whole will taken together-Gray v Minnerthorpe 3 Ves 105 Constantine v Constantine 6 Ves 102 Does v Rawding 2 B & A 448 Hall v Warren 9 H L C 420 In construing a will the Court must look to all the clauses of the will and give effect to them ignoring none as redundant or contradictory-Shib Lakshan v Tarangini 8 C L J 20 Ramachandra v Vijaja ragavulu 31 Mad 349 But if that cannot be done the general intent has to be pursued though it may involve the rejection or transposition of a particular superfluous or misplaced word-Dhamsa v Jagmohan 2 OLJ 491 32 IC 209 (210) In construing a will made in India by an Indian it is unnecessary to put a very strict or technical construction on every word and phrase which go to make up any particular direction in that will. What the Court has to do is to ascertain the true intention of the testator from the whole clause--Sardar Nowron v Putliba: 37 Bom 644 19 I C 832 (833)

If the same words occur in different parts of the Section 73
same will, they shall be taken to have Act X of Interpretation of words been used everywhere in the same 1865 repeated in different parts sense, unless a contrary intention of will appears

This section applies to Hindus Buddhists etc. see Sec. 57 and Sch. III.

94 Same words occurring more than once -If the same words occur in different parts of the ame will they must be taken to have been used everywhere in the same sense unless there appears a clear intention to the con trary-Whitmore v Craven 2 Ch C 169 Dalzell v Belch 2 Sim 319 Rhodes v Rhodes 27 Beav 413, Edysean v Archer [1903] A.C 379 (384) Aghore Nath v Kamını 11 CLJ 461 6 IC 554 (561) Whenever in a deed or will or other document you find that a word used in one part of it has some clear and definite meaning then the presumption is that it is intended to mean the same thing where when used in another part of the document its meaning is not clear -per Lindley MR in Re Birks [1900] 1 Ch. 417 (418) Thus, where a legatee is once correctly described in a will and the same name is men tioned again without any description evidence is not admissible to show that a different person was intended-Wibber v Corbett LR 16 Eq 515 Where a

But in ordinary circumstances ordinary words must bear their ordinary construction and the whole will that is the whole of the words employed by the testator must be looked at together so as to determine his whole intention It is not legitimate to take words which have a general meaning and subject them to limitations which the words do not neces arily imply Thus where Should either of these two the testator uses the following words in a will sons die without leaving any male issue the survivor of the said two sons is duly to take the whole of the property the words should not be construed in a restricted sense to mean should either of these two sons die in my lifelime but the words should receive their full meaning and in this view they relat to death whenever it should occur whether before or after the death of the testator-Chunial v Bai Samrath 38 Bom. 399 (412 413) (PC) 16 BomLR 366 18 CWN 844 Where the terms are perfectly clear to the effect that an absolute estate is given to a widow the Court cannot assume contrary to the plain meaning thereof that the testator intended to create a limited estate and then bend and twist the language in favour of the assumption so made In the face of clear and unequivocal words the construction cannot be altered or wiested from its plain meaning merely to escape from what may seem to be the hard consequences of rules of law—Sur s v Lalut Mohan 20 CWN 463 (467 471) 22 CLJ 316 31 IC 405

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Where a clause is susceptible of two meanings according to one of which it has some effect, and according to the other of which it can have none, the former shall be preferred

This section applies to Hindus Buddhists etc see Sec 57 and Sch. III

Where words are capable of a twofold construction the rule is in the case of a deed and much more in the case of a will to adopt such as tends to make it could be such as the make it could be such to make it good—Alkinson v Hutchinson 3 P Wms 260 (per Lord Tabel) Thellusson v Woodford 4 Ves 312 Where the words of a will are unambiguous they cannot be departed from merely because they lead to consequences cannot or even harsh and unreasonable But where they are capable of two informations that constructions the constructions that constructions the construction of the constructions that constructions the construction of the construc pretations that construction of them should be adopted which is in accordant with an intelligible and reasonable and not a capricious or anomalous, resile Bathurst v Errington 2 App Cas 698 When by acting on one interpretation of the words used we are driven to the conclusion that the person using that is acting capacitories. is acting capriciously without any intelligent motive contrary to the ordering mode in which men in general act in similar cases, then if the language admit of two constructions we may reasonably and properly adopt that which are these anomalies constructions. these anomalies even though the construction adopted is not the most grammatically account to the most gramm cally accurate —per Lord Cranworth in Abbott , Middleton 7 HLC 89 12 difficulty created by a particular expression ought to be solved by adopting construction which bespeaks a reasonable and probable intention and release that which would indicate an intention unreasonable capricious and inconstruit with the testables are a construit with the testables are a construit with the testables are a construit or a construit with the testables are a construit or a constru with the testator's views as evidenced by his conduct and by other diposition in his will—Index to view as evidenced by his conduct and by other diposition in his will—Index to view as evidenced by his conduct and by other diposition in his will—Index to view as evidenced by his conduct and by other diposition in his will—Index to view as evidenced by his conduct and by other diposition in his will—Index to view as evidenced by his conduct and by other diposition in his will—Index to view as evidenced by his conduct and by other diposition in his will—Index to view as evidenced by his conduct and by other diposition in his will—Index to view as evidenced by his conduct and by other diposition in his will—Index to view as evidenced by his conduct and by other diposition in his will—Index to view as evidenced by his conduct and by other diposition in his will—Index to view as evidenced by his conduct and by other diposition in his will—Index to view as evidenced by his conduct and by other diposition in his will—Index to view as evidenced by his conduct and by other diposition in his will—Index to view as evidenced by his conduct and by other diposition in his will—Index to view as evidenced by his conduct and by other diposition in his will—Index to view as evidenced by his conduct and by other diposition in his will—Index to view as evidenced by the latest and the in his will—Indar humar v. Japal humar 15 Cal 725 (749) (PC) a will ran as follows I have executed this will with the consent of all might and have got them to ugn it it as witnesses with this very purpose so that to will may be acted more fully and to the control of the control will may be acted upon fully and they may not quarrel among themselves at my death at was held that the signatures of the sons to the will must not be taken as a gnatures of atte ting witnesses because the effect of such con trucks would be to deprive the sons of their legacies (see 67) and thus millify the distribution of the property and defeat the object of the will but the more reasonable and natural reading would appear to be that the testator's object was to secure the cooperation of his sons in carrying out the dispositions of the will and the sons had appended their signatures as concurring in the dispositions contained in the will Such a construction would give effect to the testator's intention rather than frustrate it—Sham Sundar v Jagannath 4 OWN 1205 (PC) AIR 1927 PC 248 (220) 106 IC 534

85 No part rejected if it meaning if it is possible to put a Act Vof reasonable construction upon it

This section applies to Hindus Buddhists, etc. see Sec. 57 and Sch. III

- 93 The Court is bound to give effect to every word of the will without change or rejection provided an effect can be given to it not inconsistent with the general intent of the whole will taken together—Gray v Munnerthorpe 3 Ves. 105 Constantine v Constantine 6 Ves. 102 Does v Randing 2 B & A. 488 Hall v Warren 9 HLC 120 In construing a will the Court must look to all the clauses of the will and give effect to them ignoring none as redundant or contradictory—Shib Lakid in v Taraignin 8 CLJ 20 Ranachandra v Viyaja ragatulu 31 Mad 349 But if that cannot be done the general intent has to be pursued, though it may involve the rejection or transposition of a particular superfluous or misplaced word—Dhamsa v Jagmohan 2 OLJ 491, 32 IC 209 (210) In construing a will made in India by an Indian it is unnecessary to put a very strict or technical construction on every word and phrase which go to make up any particular direction in that will What the Court has to do is to ascertain the true intention of the testator from the whole clause—Sardar Nouvoji v Pullibar 37 Bom 644 19 IC 832 (833)
  - 86 If the same words occur in different parts of the Section 73 same will, they shall be taken to have Act X of repeated in different parts of will been used everywhere in the same 1865 sense, unless a contrary intention appears

This section applies to Hindus Buddhists etc. see Sec. 57 and Sch. III

94 Same words occurring more than once—If the same words occur in different parts of the same will they must be taken to have been used everywhere in the same sense unless there appears a clear intention to the contrary—Whitmore v Craven 2 C. C. 169 Dakell v Bicht 2 Sim. 319 Rhodes v Rhodes 27 Beau 413 Edyvean v Archer [1903] AC 379 (234) Alzhore va Rhodes 27 Beau 413 Edyvean v Archer [1903] AC 379 (234) Alzhore va Rhodes 27 Beau 413 Edyvean v Archer [1903] AC 379 (234) Alzhore or other document you find that a word used in one part of it less re-clear and definite meaning then the presimption is that it is intecded to mean the same thing where when used in another part of the formation and clear—her Lindley MR in Re Brits [157], if C. 417 (418) This, where a legate is once correctly described max will also be a legate to how that a different person was intended—Bibles — Cara. Life 15 Eq. 515 Where 2

Hindu testator made a will whereby he appointed his wife as his executing and heir and provided that if a on be born to him that son should be the owner of the residue and if no son be born then his wife should be the owner hild that the word owner was used in the same sense in both the places and had the effect of passing an absolute estate-farram v Kessoujee 4 BomLR 500 Where a testator said in his will I give (arpan) properties so and so to my son and in another part of the will I give (arpan) properties so and so to my daughter it was held that when the same expression ( arpan ) vas usd in favour of the son as well as in favour of the daughter, there is no reason to suppose that the expres ion was used to indicate ab olute interest only in the case of the on and that it was cut down to a life interest in the case of the daughter The bequest must be deemed to be absolute in case of the daughter also There cannot be two contradictory interpretations of the same phrase Bipradas v Sadhan Chandra 56 Cal 790 120 IC 810 AIR 1979 Cal oil Where a testator used the word children in several clauses of the will it was held that the word was used in its ordinary sen e and was intended to mean son as well as daughters in all the parts of the will and should not be interpreted in one clau e as meaning sons only and in other clauses to meaning both sons and daughters. To attribute two entirely different mean p to the same word in the same instrument without any context to justify the Court in doing so would be contrary to one of the most fundamental canona of construction—Krishnarao v Benabas 20 Bom 571 (592) Where a will provided that if the testator left a son that son would be owner and possessor (mail to qabiz) of his property that if he left no son his widow and the widow of predeceased son would be owners and pos essors thereof and that in the ere of none of them existing his daughters would be the owner and possessor of the same it was held that the words owner and posses or meant absolute on a whether used with reference to the on or with reference to the widons and daughter as all these persons were described by the same terms—Shee Sasaka v Mithana 5 OLJ 606 48 IC 177 (178)

But the Court is not precluded from putting a different construction up the same words when applied to different subject matters—Forth v CP paint 1 P Vms 667 Dee v Sunth 5 M & S 131 (132) De v Sunt 7 A & C 636 (659) Thus where the testator devised real and per onal estate to A & I described the and leave no issue of his body then to B it was hold that it words have no issue as applied to the per onal estate should be taken to must ear no issue at the time of his death but as applied to the freehold to must an indefinite failure of its us—Forth v Chapman (supra)

Moreover the rule in this section does not apply where a contrary intrinsers from the context. The principle is that if words acquire a good meaning by reason of their context the same meaning cannot be given to his when used in a different context.—Ballin v. Ballin 7 Cal. 218 (221) So. Like word mails, when applied to the widow was held to indicate only a fixed but as applied to the adopted son was interpreted to denote an ghard state.—Punchoomonery v. Troshucho 10 Cal. 342. Where a teststor dead k. vid. a will as follows. After my denth my wife if she be alive is the rightly for owner) at a she had that the word heir or or or of the state of the state of the widow meant that she should have the exist for hir oil and when applied to the dus, there the word must be hild to confer ab-olute exists.—Chantel v. Bai Mult. 21 Bom. 420 (423). Lallu v. Je anix

Testators intention to be effectuated as far as possible

Testators intention to be effectuated as far as possible

Testators intention to be effect to the full Act X of extent, but effect is to be given to it as 1865 far as possible

## Illustration

The testator by a will made on his death bed bequeathed all his property to C D for hie, and after his decease, to a certain hospital. The intention of testator cannot take effect to its full extent because the gift to the hospital is yould under section 118 but it will take effect so far as regards the gift to C D.

Note ... This section applies to Hindus Buddhists etc. see Sec 57 and Sch III

Intention of testator -The intention of the testator is not to 95 be set aside because it cannot take effect to the full extent but it is to work as far as it can-Thellusson v Woodford 4 Ves 326 (per Buller J) If the Court finds that the whole plan of the testator in respect of the property cannot be carried out it will yet uphold that part of it which gives effect to the para mount intention of the testator rather than hold that the will should fail entirely -Raghunath v Deputy Commissioner 4 Luch 483 (PC) 120 IC 641 34 CWN 61 AIR 1929 PC 283 (285) Thus where a testator showed an anxious intention that two parts of his property should go together and it was found that as to one of the two parts the testator had no power of disposition it was held that the devisee should take the other part though the testator meant him to take it only in conjunction with the other-Southey v Somerville 13 Ves. 486 Where there is an intent to create a perpetuity or to establish a line of succession unauthorised by law and at the same time there is an intention to benefit the first taker by an interest for life effect can be given to such intention although the remainder of the gift be void-Tagore v Tagore 18 W R 359 (PC) Tarokessur v Soshi Shikhuressur 9 Cal 952 (PC) Krishnaramani v Narcadra 16 Cal 383 (PC) Where there is a bequest to a class some of whom were living at the testator's decease and some might have come into existence after the death of the testator the bequest to the latter persons would be void but the whole will would not be declared inoperative the bequest to the persons living at the time of the testator's death would be valid. In such cases the Court ought to give effect to the intention of the testator as far as po sible and ought not to adopt a construction which would defeat the primary intention of the testator because effect cannot be given to his secondary intention (to benefit the unborn persons)-Krishnarao v Benabas 20 Bam 571 (592 593) Although under sec 87 effect is to be given to the intention of the testator so far us possible even if it cannot take effect to the full extent still where the intention to create an estate of inheritance not permitted by the ordinary law is clear and there is no trace of an intention to create any other kind of estate effect cannot be given to the scheme of succession so far as it concerns the persons entitled to take under the scheme who are also the persons who would take under the Hindu law of succession-Ganesh Chunder v. Lal Behary 41 CWN 1 (PC)

88 Where two clauses or gifts in a will are irrecon-Section 73 Act X of satent clauses prevals stand together, the last shall prevail

#### Illustrations

(1) The testator by the first clause of his will leaves his estate of Ramnagar to A and by the last clause of his will leaves it to B and not to A. B and have it

(ii) If a man at the commencement of his will gives his house to A, and at the close of it directs that his house shall be sold and the proceeds invised for the benefit of B the latter disposition will prevail

Note —This section applies to Hindus Buddhists etc., see Sec. 57 and Sch. III

Inconsistent clauses -The cardinal rule of interpretation for 96 deeds as well as other instruments is to gather the intention from the words, to tale into consideration the language of the entire deed and to adopt an interpretation which gives effect if possible to all the parts and does not reject any of them-Purnananthachs v Gopalaswams 41 CWN 14 (PC) But where the two parts of a will are absolutely irreconcilable and it is impossible to form one consistent whole the latter part will prevail-Constantine v Constant tine 6 Ves 100 Doe , Biggs 2 Taunt 109 Thus where some of the terms of a will in regard to a gift apparently gave an absolute interest but words subsequently occurred in relation thereto plainly showing that what was given was no more than an estate for life the donce got a life estate only-Samasundars v Gunga Bissen 28 Mad 386 Where the testator in the earlier part of the will has used language which has the effect of constituting his wife G absolute owner of the whole estate after his death and then in another clause gives a part of the estate to another person N this latter clause must be given effect to and N will take the property given to him out of the estate given to G on the principle of this section-Vithal v Narayan AIR 1931 Nag 69 (70) 134 IC 259

But a clear gift cannot be cut down by any subsequent words unless they show an equally clear intention—Kiver v Oldfield 4 DeG & J 30 Freemen 119101 1 Ch 681

The Court must endeavour to reconcile the two apparently inconsistent dispositions before resorting to the extreme rule that where there are two mean sistent clauses the latter shall prevail—per Jessel MR in Byuater v Clark 18 Ch D 17 (19) It is only in cases where two clauses in a will are so absolutely irreconcileacle that they cannot possibly stand together that the latter of the two can be allowed to prevail the theory being that the testator may have changed his mind. The rule is however never applied except on the failure of every attempt to give to the whole will such a construction as will rendo every part of it effectual—Amerikajan v ketha Ramajjan 14 Mad 65 (10) Where a will appears to have been written without legal advice the Court mut try to reconcile those clauses which at first sight appear to be contradictory Parurbas Chuhermal 114 IC 105 AIR 1929 Sund 19 (22) The rule in this section should only be applied in the last resort and before applying the rule the Court should see whether the two monasstent clauses can be reconciled Thus where a testator in the first clause of his will gave his property to his son R and then another clause provided that should R die and should he then leat a son such son should be the owner thereof held that the first clause gate and absolute interest to R which was not consistent with the second clause which gave an absolute interest to Rs son but the two clauses must be reconcil and as the result of such reconciliation it must be taken that the testator in tended a life-interest for R—Gulban v Rustomn 49 Bom 478 27 Bom.L.R 350 AIR 1925 Born 282 (286)

It must not be understood that because the testator uses in one part of his will words having a clear meaning in law and in another part words monisstent with the former the first words are necessarily to be cancelled or overthrown. Where there is a general intent as well as a particular one the general intent although first expressed shall overrule the particular—Jesson v. 18 nght. 2. Blight. 49 (56). Robinson v. Robinson 1 Burr 38.

The principle of this section does not apply to a case where the earlier clause is clear and unambiguous, whereas the later one is ambiguous and can be read in such a mainer as not to interfere with the earlier one—A Venkata

tama))a V Pitchamma "8 I C 274 A I R 1925 Mad. 161

In order that the rule in this section may be applied the two inconsistent clauses trust refer to the same subject matter. It does not apply where they are intended to provide for different circumstances—Damodardas v. Dayabhai 22 Bom. 833 (P.C.)

Will or bequest void \$189 \ \text{will or bequest not express Section 76 for uncertainty} \$1 \text{ will or bequest not express Section 76 for uncertainty} \$1 \text{ will or bequest not express Section 76 for uncertainty} \$1 \text{ will or bequest not express Section 76 for uncertainty} \$1 \text{ and } \text{ of } \text{ and } \text{ of } \text{ less for uncertainty} \$1 \text{ will or bequest not express Section 76 for uncertainty} \$1 \text{ will or bequest not express Section 76 for uncertainty} \$1 \text{ will or bequest not express Section 76 for uncertainty} \$1 \text{ will or bequest not express Section 76 for uncertainty} \$1 \text{ will or bequest not express Section 76 for uncertainty} \$1 \text{ will or bequest not express Section 76 for uncertainty} \$1 \text{ will or bequest not express Section 76 for uncertainty} \$1 \text{ will or bequest not express Section 76 for uncertainty} \$1 \text{ will or bequest not express Section 76 for uncertainty} \$1 \text{ will or bequest not express Section 76 for uncertainty} \$1 \text{ will or bequest not express Section 76 for uncertainty} \$1 \text{ will or bequest not express Section 76 for uncertainty} \$1 \text{ will or bequest not express Section 76 for uncertainty} \$1 \text{ will or bequest not express Section 76 for uncertainty} \$1 \text{ will or bequest not express Section 76 for uncertainty} \$1 \text{ will not express Section 76 for uncertainty} \$1 \text{ will not express Section 76 for uncertainty} \$1 \text{ will not express Section 76 for uncertainty} \$1 \text{ will not express Section 76 for uncertainty} \$1 \text{ will not express Section 76 for uncertainty} \$1 \text{ will not express Section 76 for uncertainty} \$1 \text{ will not express Section 76 for uncertainty} \$1 \text{ will not express Section 76 for uncertainty} \$1 \text{ will not express Section 76 for uncertainty} \$1 \text{ will not express Section 76 for uncertainty} \$1 \text{ will not express Section 76 for uncertainty} \$1 \text{ will not express Section 76 for uncertainty} \$1 \text{ will not express

### Illustration.

If a testator says I bequeath goods to A or I bequeath to A or I leave to A all the goods mentioned in the Schedule and no Schedule is found or I bequeath money wheat oil or the like without saying how much this is void.

Note —This section applies to Hindus Buddhists, etc. see Sec. 57 and Sch. III

97 Bequest void for uncertainty — To the validity of every disposition as well of personal as of real estate it is requisite that there be a definite subject and object and uncertainty in either of these particulars is fatal —Jarman on Wills, (5th Edn.) Vol. I p 327

As regards chantable uses, it has been said that dispositions made to chantable purposes are strongly favoured in point of construction and have been upheld even where the bequest would upon the ordinary principles which govern the construction of testamentary dispositions, be void for uncertainty—Alterney General v Matheus (1677) 2 Let 167 Ittorney General v Whorwood (1750) 1 Ves. Sen 531 (536) Clark v Taylor (1853) 1 Drus 642

But even in the case of such a bequest if the purpose for which the bequest is made is uncertaint by those a direction by the testator to spend the surplus money in proper and just acts for the benefit of my soul is void for uncertainty—Gokool Nath v Issur 14 Cal 222 A bequest for purposes for popular usefulness or for purposes of charity is bad for uncertainty—Trikom Das v Han Das 31 Bom 583 A bequest of a sum of money for a building for Hindus exclusively for general purposes to be erected on a certain land belonging to the testator is void for uncertainty—Chmubhai v Bai Manekbai 34 Bom L R 609 A.I R 1933 Bom 451 (452) 138 IC 326 A bequest to the effect that the executor of his own judgment may give as a donation or apply or invest the balance to or for any person or persons for his or her or their benefit or to or for charitable or religious institution or object as he may think proper is void for uncertainty—Mrs Elkhus v Dr Cullen 13 N.L.R 51 40 IC 791 A direction to the executor to lay out such portion of the estate as he might think fit towards the erection of a pucca bathing ghat

at a suitable place in the Hooghly was void for uncertainty—Suibomonfole via Mahendra 4 Cal 508 A bequest for dharma or Lhairat is void for uncertainty—Runchordas v Parvatiba: 23 Bom 725 (PC), Cursendas v Unditaints 14 Bom 482 Devishantar v Moturam 18 Bom 136, Morani v Norba 17 Bom 351 Vundravandas v Cursendas 21 Bom 646, Marumbi v Taimaba 31 Bom LR 135 116 IC 242 AIR 1929 Bom 127 (128) Gurid Single Sher Single 78 PR 1912 Parthasarathi v Thruvangadam 30 Mad 310 A bequest for Kar e Khair (a good deed or a chantable act) is void for agrees and uncertainty—Radhey Shjam v Radhey Lal 3 OWN 714 AIR 100 Journal 130 97 IC 934

The privilege of controlling by will the disposition of property after deal is subject to the condition that such disposition must be made in favour d ascertained or ascertainable persons or objects. A testator is not permitted to delegate to others the disposition of his property subject to this that he mi confer upon his trustees a power of selection and apportionment among a definite prescribed class of beneficiaries In the case of charitable objects the law by reason of the favour in which charity is held has accepted such objects \$5 constituting a sufficiently ascertained class notwithstanding its wide extent and permit a testator to direct a fund to be distributed among such chanties and such porportions as his trustees may in their discretion decide But in other cases the requirements of definite precision is enforced in the definition of the individuals or classes to be benefited. A bequest in favour of institution societies or objects established in or about a named place for benevolent educational or chantable purposes to be selected by the trustees is bad for vagueres -The Attorney General for New Zealand v. The New Zealand Insurance Co 41 CWN 321 (PC)

But a direction by the testator to the trustees to spend suitable sums for certain specified purposes eg for sradhs for feeding and making glis lo Brahmans and the poor for reading purans and for offering prayer to God, if valid—Duarka Nath v Burroda 4 Cal 443 A dedication of property by a rd for religious ceremones ( Dharma Krisa ) in connection with the death of his testator is not void for uncertainty The use of the word Dharma does not make the horsest make the horsest make the bequest uncertain because the religious ceremonics in connection and the testator's death have a definite meaning (and do not fall within the mixed of the Privy Council ruling in 23 Bom 725)—Abdul Sakur v Abubakkar 54 Bot 338 32 Bom.LR 215 AIR 1930 Bom 191 (196) A bequest for performant of ceremonies and giving feasts to Brahmans is not void for uncertainty—Lablas v Baijnath 6 Bom 24 (25) A bequest for a sadai art would not be vo dis uncertainty where it was clearly the intention of the testator that the sadd of the be set up should be on the same scale as that already carried on by him at another place, so that there are a large that the same scale as that already carried on by him at a fight place so that there would be no difficulty in ascertaining the nature of the sadat art and the sum to be expended upon it—Jamnabar v Khimpi 14 Box. I see also Morary v Neubas 17 Bom 351 A direction to the executors to apart a sum not exceeding Rs, 25 000 for distribution among the testator's par relatives dependants and servants is valid—Monorama v. Kali Charan. 31 Cd. 166 \ testator provided that his executors shall out of his estate set and the sum of three lakhs of rupers and shall spend the said sum or portion of a according to law in connection with some good works of charity in such mind as they may think jut and proper such as hospitals, sanitarium, jut and live musafer khona Madress, chairs musaler khana Madrassa scholarships, dharam halas medical dispensaries the Held that the beque t to chanty was not void for uncertainty—Advocate Grand \ Inrbaba: 41 Bom. 181 17 Bom L.R. 799 31 IC 106

Where it appears from the words of a grant that the testator had a general chantable intention and the particular mode prescribed for carrying out that intention fails such failure would not destroy the chanty but the property would have to be devoted to other religious or charitable purposes according to the cy pres doctrine—Re Pyme [1903] 1 Ch 83 Re Slevin [1891] 2 Ch 236 Abdul Addr y Bat Safabu 36 Bom 111 (115) Re Hormson 32 Bom 214

A bequest is void if the subject or object of the gift is uncertain that is the gift of an indefinite amount or part or share of a property for an indefinite purpose is necessarily uncertain and void. Thus where the testator declared that if after the performance of all the above acts there remains any money or moveable property as surplus then the executors shall be able to spend the same in just and proper acts for my benefit held that the amount of the surplus being uncertain and the manner in which the amount is to be spent being indefinite the bequest was void—Gokool Nath v Isinir 14 Cal 222. But if the will furnishes any reasonable data for accrtaining the amount of the gift the Court will try to ascertain it and give effect to the disposition. Thus where the bequest was for erecting a Shivas temple at a reasonable cost within the compound of the baitakhana house and the nature of the building was described the bequest was not void for uncertainty—Gokool Nath v Issur supra. See also Jamnabhas y Ahmin 14 Bom 1 cited above

In other words before rejecting a will as void for uncertainty the Court should construe the will so as if possible to give effect to the legacy. The modern doctrine is not to hold a will void for uncertainty unless it is utterly impossible to put a meaning upon it—fix re Roberts (1881) 19 Ch. D 529; Bharadwaja v Kolandas clis 29 M.L. J. 77. 31 I.C. 786 (788). This rule applies more strongly in the case of a will written by an Indian testator in the English language where it is clear that he has not been able to express himself accurately and clearly in that language. See Bharadwaja v Kolandavdius since it is the control of the

98 Legatee's right of selection—Where a gift comprises a definite property of a larger quantity it is not rendered migatory by the omission of the testator to point out the specific part which is to form such portion, the legitee being in such a case entitled to select—Jarman on Wills (5th Ech.) Ved. "p 331 In such cases the legatee will be entitled to select the part be will such the entitled to select the part be will see thereby making the uncertainty certain. Thus, if a testator bequests to 4 z given number of articles forming part of a stock of articles of the same beaution as for instance if he has twenty bores in his stable, and programs at of them, the legatee has the right of selection—Jacques v Commercia at the them the legatee has the right of selection—Jacques v Commercia. In the selection will be about the legate that the bequest was not void for uncertain. It is a proceed that the bequest was not void for uncertain. It is a proceed that the bequest was not void for uncertain. It is the proceed that the bequest was not void for uncertain. It is the proceeding that the bequest was not void for uncertain. It is the proceed that the bequest was not void for uncertain. It is the proceed that the bequest was not void for uncertain. It is the proceeding that the bequest was not void for uncertain. It is the proceed that the bequest was not void for uncertain. It is the proceed that the bequest was not void for uncertain. It is the proceeding that the bequest was not void for uncertain. It is the proceed that the bequest was not void for uncertain.

Words description contained to 2 and of property, seems the subject of the subjec

the death of the testator

This section applies to Harm 3 of 1, 22 30 Sec 37 33 5 h

This section may be compared with sec 24 of the English Wills Act 1837 (1 Vict c 26)

99 Principle of the section -The principle of this section is in accordance with the rule of English law under which the will has to be construed with reference to the real estate and personal estate comprised in it to speak and take effect as if it had been executed immediately before the death of the testator and as if the condition of things to which it refers in this respect is that existing immediately before the death of the testator unless a contrary intention appears by the will Halsbury's Laws of England Vol 28 pp 591 699 Bodi v Venkatasuam: 38 Mad 369 (372) 21 IC 73, it must therefore follow that a will takes effect with respect to the property existing at the testators death Thus where a testator gave a legatee 25 shares in a company and a the date of the will each share was £50 but by the time of his death the share had been divided into £10 shares it was held that the legatee took only 25 ten pound shares-Re Gillins Inglis v Gillins [1909] 1 Ch 345 Similari where the bequest was of the house and effects known as Cross-Villa which at the time of the will was a piece of ground with a house but the testator subsequently erected buildings thereon it was held that the whole ground with the buldings subsequently erected would pass under the will-Re Erans Erans v Powell [1909] 1 Ch 784

A will speaks from the death of the testator and not from the date of its execution and a mere recital in it of the existing property does not exclude future accretions to the property of the testator from the operation of the terms of the will—Abdulsarur v Abubakrar 54 Bom 358 32 Bom LR 215 4IR 1930 Bom 191 (196 197) 127 I C 401 Where in a will bearing a date, the testator gave all the estate of which I am now seised and possessed it was hid that even the word now must be taken as referring to the time of the testalors death and not to the date of the will see Wagstaff v Wagstaff (1869) LR 9 Eq 229 Hepburn \ Skning (1858) 4 Jur (NS) 651 Dudley \ Champon [1893] 1 Ch 101 But where a testator has used words of such a character that it is doubtful whether or not they are sufficiently extensive to cover addition to the property made between the date of the will and that of his death the will is to be construed as referring to property as at the date of the will will be to be construed as referring to property as at the date of the will will be to be construed as referring to property as at the date of the will will be to be construed as referring to property as at the date of the will be to be construed as referring to property as at the date of the will be to be construed as referring to property as at the date of the will be to be construed as referring to property as at the date of the will be to be construed as referring to property as at the date of the will be to be construed as referring to property as at the date of the will be to be construed as referring to property as at the date of the will be to be construed as referring to property as at the date of the will be to be construed as referring to property as at the date of the will be to be construed as referring to be const v Byng 1 K & J 580 Re Portal and Lamb (1885) 30 Ch D 50 But it by will neither contains any expression indicating that the testator intended in provide for subsequent acquisitions nor does the will contain anything to soft that he wished to the subsequent acquisitions nor does the will contain anything to soft that he wished to exclude such acquisitions held that the presumption again an intestacy in respect to the after acquired properties of the testator will present that is the will be the same of the testator will present that it is the will be the same of the testator will present that it is the will be the same of the testator will present that it is the will be the same of the testator will present that the presumption of the testator will present the testator will be the same of the testator will b that is the will must be held to embrace the after acquired properties—Alai and v Danakott 99 IC 775 AIR 1927 Mad 383 (386) Rangoo v Hanis & NLR 255 AIR 1932 Nag 163 (165)

Description of specific property —Where the immoveable properties devised were described specifically in the will it must be held that the testing of but that he intended to make a general grit of all the properties he might do possed of but that he intended to give only the specific properties mentioned in will and that the will had not the effect of vesting in the devisee such immove able properties as the testator acquired by inheritance after the execution will—Bankantha v Kashi Nath 16 IC 553 (554) (Cal) Where the testing the properties and referred to them as the above mentioned movemble and immovable properties held that the property acquired subsequent to the will was not intended to be disposed of—Majallal v Legisla.

17 Bom LR 705, 30 IC 915

91 Unless a contrary intention appears by the will, Section 78,

Power of appointment a bequest of the estate of the testator Act X of executed by general best shall be construed to include any pro-

appoint by will to any object he may think proper, and shall operate as an execution of such power, and a bequest of property described in a general manner shall be construed to include any property to which such description may extend, which he may have power to appoint by will to any object he may think proper, and shall operate as an execution of such power

This section does not apply to Hindus Buddhists Sikhs or Jainas See sec, 57. It is based on sec 27 of the English Wills Act. 1837 (1 Vict. c. 26)

100 A general power of appointment may well be exercised by a will executed previously to the creation of the power and that too by a mere residuary gut Thus one N J Wadia (a Parsi) made his will in 1885 and thereby appointed his wife his sole executrix and gave his residuary estate in the event of his dving without issue to his executrix upon certain charitable trust and appointed certain trustees giving directions as to how the trust was to be dis charged In 1888 the testator by a deed settled his Ambolee properties in trust and by that deed gave power of appointment to himself providing that the trustees shall hold the said properties in trust for such person or persons or chanty or chanties and for such purpose or purposes as the said N J Wadia should by deed or writing or by his will appoint. The question was whether the Amboleo properties comprised in the settlement of 1888 vested in the trustees of the charities under the will of 1885 Held that the testator must be said to have exercised his power of appointment reserved to himself under the deed of s ttlement of 1888 by the will which he had made in 1885 although it was accuted three years previous to the deed of settlement-Dinshaw v Dinshaw 31 Bom 472 9 Bom.L.R 488

92 Where property is bequeathed to or for the Section 79
Implied gift to objects benefit of certain objects as a specified Act X of of power in default of appointment of certain objects in such proportion as a specified person may appoint, and the will does not provide for the event of no appointment being made, if the power

a specified person may appoint, and the will does not provide for the event of no appointment being made, if the power given by the will is not exercised, the property belongs to all the objects of the power in equal shares

#### Illustration

A by his will bequeaths a fund to his wrife for her life and directs that at he death it shall be divided among his children in such proportion as she shall appoint. The widow dies without having made any appointment. The fund will be divided equally among the children.

Note -This section does not apply to Hindus Buddhists Sikhs and Jairas.

Ion 80 N of

ection 81 ct X of

93 Where a bequest is made to the "heirs" or "right hurs" or "relations" or "nearest rela Bequest to herrs.

etc. of particular per terms.

tions" or "tunily" or "kindred" or "nearest of kin" or "next of kin" of a particular person without any quali

fying terms, and the class so designated forms the direct and independent object of the bequest, the property be queathed shall be distributed as if it had belonged to such person, and he had died intestate in respect of it leaving assets for the payment of his debts independently of such property

# Illustrations

(i) A leaves his property to my own nearest relations. The property coes to those who would be intitled to it if A had died intestate learning assets for the payment of his debts independently of such property (ii) A bequeaths 1000 rupees to B for his life and after the death of B to my own right heirs. The legacy after B's death belongs to those via would be entitled to it if it had formed part, of A sunbequeathed property (iii) A leaves his property to B but if B dies before him to B's nextle kin B dies before A; the property devolves as if it had belonged to B and be had died intestate leaving assets for the payment of his debt and predicting the property devolves as if it had belonged to B and be had died intestate leaving assets for the payment of his debt and predicting the property devolves as if it had belonged to B and be had died intestate leaving assets for the payment of his debt and predicting the property devolves and the payment of his debt and property as the property of the payment of his debt and property as the property devolves and property and property as the property devolves and property as the property devolves as a subsequently as the property devolves as the property devolves

such properts,

(w) A leaves 10 000 rupces to B for his life and after his decess to

the heir of C The legacy goes as if it had belonged to C and he had def

intestate leaving assets for the payment of his debts independently of he legacy

Note -- This section does not apply to Hindus Buddhists, Sikhs and Jamas

101 The expression without any qualifying terms in this section reletion to the bequest and not to the relations—Pestonji v. Khurshed Bar 7 Bond. R. 207 (210) that is the bequest must not be conditional But the Sind Court dissenting from this view has said that the expression more naturally refers to the heirs and not to the bequest because it is the words indicating the relation (heirs relations next of lins etc.) which need not be qualified Further the words the words without any qualifying terms had referred to the bequest they will have appeared after the word bequest It is also to be noted that those and do not appear in the analogous section 94 from this it is evident that if sec \$ was intended to be limited to an unconditional bequest sec 94 also would have been similarly fimited—Dinbas v Nusserwann 28 I C 481 (484) (Sind)

Where a bequest is made to the "representatives" or 'legal representatives" or "personal representatives" or "executors or ad Bequest of represen tative etc of parti ministrators' of a particular person, cular person

and the class so designated forms the direct and independent object of the bequest the property bequeathed shall be tributed as if it had belonged to such person and he had died intestate in respect of it

# Illustration

A bequest is made to the legal representatives of A A has died intestall, and insolvent B is his administrator B is entitled to receive the legacy and will apply it in the first place to the discharge of such part of As dchts as may remain unpaid if there be any surplus, B will pay it to those persons who at As death would have been entitled to receive any property of As which might remain after payment of his debts or to the representatives of such persons.

Note —This section does not apply to Hindus Buddhists, Sikhis and Jamas

Where property is bequeathed to any person, he section 28 det & of limitation

Bequest without words test interest of the 1865 of limitation three mill that only a restricted interest

was intended for him

This section applies to Hindus Buddhists etc see Sec 57 and Sch III It may be compared with sec 28 of the English Wills Act 1837 (1 Vict C 26)

102 Whole interest —No technical words are necessary according to Hindu law to confier an absolute interest on the devisee Where an estate 18 given to a man simply without express words of inheritance it would in the absence of a conflicting context carry by Hindu Law an estate of inheritance—Tayor v Tacore 9 BLR 377 (39s) 18 WR (PC)

The words putra poutrads krame have acquired a technical force and are used as meaning an estate of inheritance. They do not limit the succession to sons grandsons and male descendants alone but include female heirs where by law the estate would descend to such heirs-Bipradas v Sadhan Chandra 56 Cal 790 120 IC 810 AIR 1929 Cal 801 (804) Ram Lal v Secretary of State 7 Cal 304 (PC) (on appeal from Hart Dast v Secy of State 5 Cal 228) Lalit Mohun v Chukkun Lal 24 Cal 834 (851) (PC) Panchubala v Jatindra 53 Cal 816 98 IC 173 A I R 1926 Cal 993 (995) The words putra boulrads parsaniam even when applied to a female confers on her an absolute and not a mere life estate-Bhujanga v Ramayamma 7 Mad 387 The words O putra poutradi have the same meaning as putra poutradi krame and convey an absolute e tate-Gooroo Das v Sarat Chund 29 Cal 699 The words waris and Janas'un are well known words denoting an estate of inheritance-Jagdeo v Dy Commissioner 2 Luch. 507 29 OC 176 AIR 1926 Oudh 431 (441) 96 IC 47 The words heir and successor imply a grant of an absolute estate but great stress should not be laid upon those words for the use of those words may be equally consistent with the grant of a life estate-Ibid

So also when the word malik is used in Hindu wills it is to be understood that a heritable and alternable estate is conferred unless the context indicates a different meaning or intention—Lalit Mohini v Claukkun Lall 24 Cal 834 (849) (PC) The use of the words milksjet and malik isa qabis in a Hindu will conveys presumably full ownership in the property conveysed—Ram Anari v Altma Singli 8 Lah 181 103 1C 506 A IR 1927 Lah. 404 (400) Even when applied to females the word malik implies an absolute gift and there is no authority for introducing into the will the idea that a female ought not to obtain anything beyond an estate for the file time—Lali Ramiesan V bal Acer 24 Cal 469 (409) Raj Narani v Aatjayani 27 Cal 649 (on appeal from 27 Cal 44) Kollany v Luchinec 24 WR 395 Padam Lal v Tek Singli 29 All 217 Sudhamani v Surat Lal 28 CWN 541 (544) (PC) A IR 1923 PC 65 IC 71 Sauman v Shib Narajani 1 Pat 305 (PC) 26 CWN 129 65 IC 971 Sauman v Shib Narajani 1 Pat 305 (PC) 26 CWN 129 66 IC 193

AIR 1922 PC 63 Surajmant v Rabi Nath 30 All 84 (PC) Thaise Parshad v Jamra Kunuar 31 All 308, Fatehchand v Rupchand 21 CWV 102 Amarendra v Suradham 14 CWN 458 5 IC 73, Bijai Bahadur v Mathura 25 OC 345 68 IC 555 AIR 1922 Oudh 278 Sartay v Maralet 29 OC 153 AIR 1926 Oudh 332 (335) Terathmal v Thanwarsingh la SLR 202 AIR 1921 Sind 76 66 IC 720 Bhasaram v Nathu AIR 1991 Nag 195 The word uaris (hear) when applied to a female (eg my daughter shall be my uars) means the same thing as malik and will convey the idea of an absolute estate being given to her-Chumlal v Ba: Muli 24 Bom (3) (423) Where a testator declared I give devise and bequeath unto my with and her heirs and assigns for ever all my real and personal estates and effects, held that the gift was absolute-Taruck Nath v Prosonno 19 WR 48 & also Kollany v Luchmee Pershad 24 W R. 395, Pubitra Dass v Damooda w WR 397 (Note) Where a testator provided in his will that his sons 4 and B would be proprietors half and half of the whole estate and in a later clause placed restrictions on the powers of enjoyment and alienation held that each of the sons took an absolute interest in half the estate and the restrictions on the powers of enjoyment and alienation v cre void as being repugnant to the absolute gift (Sec 138)-Jehangir v Aaikhusru 13 Bom LR 141 9 IC 951 (953)

103 Bequest for life with general power of appointment—
Where a testator bequeathed the income of his house to his two sons G and B
for life the monety of the corpus to go to such person as each of his two son
shall by will or deed appoint and in default of appointment to that her,
executors and administrators held that the bequest conveyed an absolute suit
in a monety to each of the sons—Gregory V Samuel 21 C WN 992 42 IC 26.
Bapini v Han Esmail 46 Bom 694 (699 701) 23 Bom LR 1299 64 IC 84.
But where a testator gave his property to his wife for life and empowered her
dispose of the property as I have directed her orally and according to the inset of the son of t

Bequest to females —Ordinarily a bequest by the testator w his wife confers only a life interest on her In constraing the will of a Hinda the ordinary notions and wishes of Hindus with respect to the devolution of their property should be considered and it must be assumed that a Hindu know that as a general rule at all events women do not take absolute estates of a heritance which they are able to alienate—Sures v Lalit Mohan 20 CWN (567) 21 LC 405 (467) 31 IC 405 Probabl Lal v Harish Chandra 9 CWN 309 Shansh Huda v Sheuakram 14 BLR 226 (PC) 22 WR 409 LR 2 IA 7 Bible Tarini v Peary Lall 24 Cal 464 (651) Caralabath v Cota 33 Mad 91 (6) A Hindu husband is not competent to create in favour of his wife an about interest in immoveable property bequeathed by him to her though it is necessary in order to create such interest to use express language to that effect we feel bound to add that though sec 3 of the Hmdu Wills Act has made sec. of the Indian Succession Act 1865 (present section) applicable to a case let the present (ie bequest to females) yet we think it very doubtful whether the sec. 82 to Hindu wills might have the effect of partially abrogating the risk of Hindu law that a gift by the husband of immoveable property to the sufe suito.

express words creating an absolute estate conveys only a limited interest -Bhoba Tanni v Peary Lall 24 Cal 646 (650) In the absence of express words giving her a heritable right or power of alienation a widow taking under her busband's will takes only a widow's estate in the immoveable property bequeathed to her -- Koonjbehari v Prem Chand 5 Cal 684 Hstabas v Lakshibas 11 Bom 573 (578) Annan v Chandrabas 17 Bom 503 Where the terms of a bequest to a female are ambiguous the Court having regard to the inference to be drawn as to the testator's intention from the general understanding among Hindus as to the nature of a woman's estate and from the surrounding circumstances may construe the bequest as having conferred on the devisee only an estate for life and not an absolute proprietary title-Mathura v Bhikhan 19 All 16 The Courts have always leaned against such a construction of the will of a Hindu testator as would give to his widow unqualified control over his property. So where a testator directed his wife to take possession of and emov his property just as I am the owner at present, but used no words of inheritance and gave no power of disposition the wife took only a life estate. The use of such expression as my wife is the owner after me or my wife is the heir merely shows that the testator is providing for the succession during the life time of the widow and not altering the line of inheritance after her death-Harilal v Bas Rewa 21 Bom 376

The word malik when used with reference to females may not by itself necessarily create an absolute interest but the word nurbyudha malik means absolute owner. This expression is the strongest and most unequivocal phrase employed in the vernacular to denote absolute ownership—Sures v. Lalit Mohan 20 C WN 483 (468) 31 IC 405. The recital in the will of the testator that his wife should enjoy the property is important to indicate the intention of the testator. If he does not leave any specific property to his wife and without words of inheritance or words empowering her to alienate which are usually inserted when it is intended to give an absolute estate but he leaves the property to her to enjoy the conclusion is that he did not intend that his wife should have the power to alienate the estate—Caradapaths v. Cate. 33 Mad. 91 (93)

The mere use of the word malsk does not show that the donee was intended to take an absolute interest. The effect of the disposition must be gathered from all the terms of the will-Amarendra v Shuradham 14 CWN 458 (460) 5 IC 73 Punchoomoney v Troylucko Mohines 10 Cal 342 On the other hand where the testator uses expression malik like myself the effect is to create an absolute interest in the donee-Ray Narain v Katyani 27 Cal 649 Raj Narain v Ashutosh 27 Cal 44 Where the words themselves show that the female took an absolute estate the mere fact that she is a widow or that there are no words of inheritance or words authorising her to alienate are not in them selves sufficient to show that the widow takes only a restricted estate-Caralapathi Cota 33 Mad 91 (93) Where the will made first an absolute gift to the widow it could be reduced to a limited estate only by clear unambiguous words cutting down the first bequest-Aaran Singh v Rupuants 6 Lah L.J 412 85 IC 290 AIR 1925 Lah. 122 Though a mere gift of immoveable property by a Hindu hisband to his wife does not carry with it the power of alienation yet where any such property is given by the husband to the wife with express power of alienation or when this power is implied by the grant, she would acquire an absolute power of di posal over the property-Sarada Sundari v Aristo Jiban 5 CWN 300 (303) Thus where in a will a legacy was given to the daughter to the effect that she shall possess as owner and possessor of all the rights of gift sale, etc. in respect of all my property moveable and immoveable and on

the death of the said daughter the sons born of her womb will equally on all my property it was held that the testator's intention was to give an absolute estate to the daughter—Gobinda v Benode 12 CVN 44 (47) A will exceed by a Hindu ran thus I make the provisions mentioned below so that my properties may not pass to the control of others after my hietime and that the may go to my lawful heirs. The properties are to be enjoyed by my daughter and my son in law (who is also my sister's son) with saruasualhantham and putra pourta paramparyam. It was held that the daughter and her insiste took an absolute estate under the will and that the words conferring the absolute estate were not controlled by the somewhat vague expressions of the settler sentent expression of intention cannot control or qualify the very unambgued words in which he conveys an absolute estate—Sankara Narajana v Koppon.

23 LW 81 A I R 1926 Mad 236 (237) 91 I C 973

Where a Handu testator by has will gave immoveable property to a wider stating it to be for her maintenance and after making vanous other pits it other persons added a clause by which he declared that all the gifts under the will should be absolute held that the gift of property to the widow for mastenance was absolute—Remachandra v Vigos oragatulu 31 Mad 349 (33) Aggesthuar v Ramchandra 23 Cal 670 (678) (PC) Jecuatiananad v Varada Pilla 19 MLT 52 32 IC 111 But a simple grant of immovable property to a female on account of her maintenance without using any language conferring on her a power of altenation was held to bequeath only a life interest in the property—Numnu Meah v Krishnessum 14 Mad 274 (276) See identification of the property—Numnu Meah v Krishnessum 14 Mad 274 (276)

In order to ascertain whether the intention of the testator was to gif all absolute estate or only himsted estate to the window the Court may look to be surrounding circumstances. Thus where a will made a bequest of the document of two houses to the windows but there was no distinct statement that the least were to be taken by them and in the same will another house was made one to another person in full ownership and apt words were used for that purpose and further it appeared that the windows had already been residing in the based under an agreement which gave them the right to have the houses for their built had to the total purpose of ascertaining the intention of the testator the will should be read in the light of the surrounding circumstances and that the will did not confer an absolute estate to the widows but only a life sitate.

Bequest, if absolute —Where the terms indicate that a bequest is as absolute one and further interests are given merely after or on the termination of that dones interest and not in defeasance of it the absolute interest and not cut down and the further interests fail. Where the terms of a will provide that on the death of the testators wife and one of the son sufe the testator son B would get the aforesend two propreties in absolute interest (minh as ast)) and then it was further provided that at the time of the will the was no grandson living but if any grandson should be born then failing he own sons and failing those in whose favour provision has already been much the grandsons would get the properties absolutely failing that the daughter would get them it was held that the intention of the testator was to make absolute gift in favour of B—Heradhone v Dasarathu 67 CL J 237

105 Words of limitation —A testator after giving a twelt endshare of his property to his two wires by a will added a clause that no prize of the family of the fathers of my two wives shall be able to exercise any countries.

ver the money and property left by me held that this would be wholly incon istent with an intention to give the wives an absolute estate and therefore the adows took only life estates under the will-Bhoba Tarms v Peary Lall 24 Cal (652) Where a testator making his wife the rightful owner of all his properties declared that during her life time she 'shall be competent to alienate by ale, rift or otherwise as may be necessary the properties left by me as she pleases and then the will giving her authority to adopt contained the further lause that the son so adopted shall after the death of my wife become the owner of all my properties, held that these words clearly indicated that the interest levised to the widow was not absolute but a restricted one-Probodh v. Harish Chandra 9 C.W.N 309 Where a Hindu gave a power of adoption to his wife directing that so long as the wife should live she should remain in possession of all his property held that the widow took only a life interest with remainder to the adopted son-Bepin Behave v Brojonath 8 Cal 357 (363) A testator bequeathed his property to his daughters in equal shares and directed that in case any of them died childless the other daughter and her sons were to get the whole property; and in case of the death of either daughter leaving sons the share of such daughter was to be paid to such her sons share and share alike held that masmuch as the surviving daughter and her sons were to get the estate to the exclusion of female issue of such daughter who would have been entitled if their mother's estate had been absolute the language of the testator was intended to pass only a restricted interest to the daughters. They were to take in equal shares for life with the benefit of survivorship between themselves-Radha Prasad v Ranec Man: 35 Cal 896 (903) (PC) reversing 33 Cal 947 In a Madras case however where the totator bequeathed half the property to his wife and the other half to his adopted grandson and there was a provision that on the death of either of them the survivor was to take that share it was held applying this section that the wife was entitled to take the whole interest of the testator-Pulliah Chets v Varadarajulu 31 Mad 474 (476)

A testator made the following bequest on my death my brother's widow B and on her death her daughter h se my niece will get one fourth share Held that the gift in favour of B was not a gift of an absolute interest. The apparently absolute nature of the gift to B was cut down to a life estate by the direction that on her death the property would go over to her daughter-Harendra v Basanta Kumar 22 CWN 689 (691) 43 IC 991

What are not words of limitation -A testator provided in his will to this effect. After my death my wife will be malik like myself having right to give away sell etc and after the death of my wife all the property will come under the control of my son if he is reformed, otherwise if the son s character is not reformed up to the death of my wife that propert, will come after my wife's death on behalf of the grandsons Held that the creet of the will was to vest the property absolutely in the testator's wife the words following the absolute gift to the wife did not indicate that a restricted or Limited interest. was intended to be given to her Here the intention of the testa or was to keep the property out of the hands of the son so long as he did not reform his charac ter so that if he had contented himself with a gift in favour of he wife and made no other disposition to take effect after her death, this primary coject mucht have been completely defeated masmuch a whatever portion of the property might be left undisposed of by his widow would have passed by inheritance to his son. It was to meet this possible contingency that the learnest provided that if any portion of the estate was left intact at the time of his wood's death it was not to find its way into the hands of hi son-imarendia & Sharadhams 14 CW.

458 (461) 5 I C 73 Where the will of a husband devised immoveable properly to his wives in these terms If neither of them have any children then both my wives will enjoy and appropriate at their will the entire properly in full proprietary right. In the event of their death my next reversionary heir will have such property as will remain held that the words sxi property as will remain mean not the property left by the testator but so mid of it as will remain after the death of the widows and the natural inference is that an absolute power of alienation was conferred on the widow-So M Sundars v Krito Jihan 5 CWN 300 (304) Where a will provided that the testator left a son he would be owner that if he left no son his widow would be owner and in the event of none of them existing his daughter would be owner held that the effect of the disposition was not to confer a life estate to any of the legatees or even successive estates on the several but to cook an ab olute estate on the eventual legatee whoever such legatee might be at the time of the testator's death-Shiv Shankar v Mithana Kuar 5 OLJ 60 4 IC 177 (178) Where a testator left an adopted son and gave authority his widow to take three sons in adoption one after the death of another the will contained a provision that the adopted son should succeed to the on the death of the testator and that on the death of one adopted son and into the adoption of another son the estate would remain in the ownership possession of the widow as ordinary heir the estate to vest in the next boop of son immediately on his adoption held that the adopted son would take not life interest but an estate of inheritance subject to the condition of defeasing Manskyamala v Nand Aumar 33 Cal 1306 11 CWN 12

If a widow takes an absolute interest in the estate devised a gift over what might remain undisposed of by her is void and inoperative in law therefore where a testator provided in his will that his widow should be absolute owner (mibyudha malik) with right of gift sale and other tran fer and there was a further clause that if at her death there be no adopted son his but according to Hindu law who shall be alive at the time shall get the property remaining after disposal by his wife by sale or gift held that the power of the position having been given the widow took an absolute estate and the crash of further interest after the termination of the dones interest which in was absolute did not cut down the absolute estate but was void—Suresh Chast V Latt Mohon 20 CWN 463 (467) 22 CLJ 316 31 IC 405 Sulochald Lagaritation 40 CVN 463 (467) 22 CVN Jagattarini do CLJ 51 53 IC 602 The testator after describing himself the will as the malik and quabiz of the properties (ie in possession of the possession of the properties with committee with c perties with complete proprietary right) provided as follows my wife shall be malik and qabiz she will be competent to enjoy the property There was also a provision that on her death the provision would revert to his collaterals. Held that since the testator in describer nature of the estate demised to the widow used exactly the same expression a he used to describe his own right and title in the properties, and find added that she would be competent to enjoy the properties, and will complete title moved to the competent to enjoy the property in even with complete title passed to the widow and the last provision it that the perties after her death should revert to his collaterals should be considered. inoperative—Ridhu Ram v Teju Mal 6 Lah L J 600 86 IC 331 ALR 12

A testator devised his property to his daughter by his will which for our test and daughter and her husband should live in my house and mark themselves and use and cripoy it but the relatives of her husband of creditors have got no might of amy kind to take it and if any laise be ken

her such issue is the owner thereof Held that the daughter took absolutely under the will and that the provision that the issue of the daughter should be the owner of the property did not mean that there was a gift of the life estate only to the daughter and a gift over to her issue but that the words were added merely to emphasize the absolute gift already made to her and the exclusion of her husband's relatives from any right to enjoy the property-Chundal v Bhogdal 19 Bom L R 930 43 I C 468 (469) A testator gave his property absolutely to his wife and adopted son with power of sale gift etc. and further directed that if the aforesaid adopted son or my wife aforesaid shall find it necessary to sell any of the properties left by me they shall be entitled to sell it to strangers if my heirs and co sharers refuse to purchase it for an adequate consideration Held that this only meant that before selling a portion to a stranger which the widow had perfect right to do she should offer it or give the opportunity of purchasing it at an adequate consideration to the co heirs. This by no means limited her power of sale in any degree-Sudhamans v Surat Lal 28 CWN 541 (544) (PC) AIR 1923 PC 65 73 IC 530 The testator directed that his house should be altered and divided into four houses and that the executor should give them to the testator's four daughters. The will further provided In case any of these four daughters may through want of money wish to sell her share any of the remaining daughters may then purchase the same. In case they may not consent to do so she herself shall enjoy the same and shall not in the least sell it to others Held that each daughter took an absolute estate under the will and that the clause restraining the power of ahenation amounted only to a pre emption clause and did not cut down her estate to a mere life estate-Ghanshamdoss v Saras wathiba: 21 L W 415 AIR 1925 Mad 861 (866) 87 IC 621

Where property is bequeathed to a person with a Section 83 Bequest in alterna bequest in the alternative to another Act X of person or to a class of persons, then, if a contrary intention does not appear by the will, the legatee first named shall be entitled to the legacy if he is

alive at the time when it takes effect, but if he is then dead. the person or class of persons named in the second branch of the alternative shall take the legacy

#### Illustrations

(1) A bequest is made to A or B A survives the testator B takes nothing (ii) A bequest is made to A or to B A dies after the date of the will and before the testator The legacy goes to B

(111) A bequest is made to A or to B A is dead at the date of the will The legacy goes to B

(iv) Property is bequeathed to A or his heirs. A survives the testator. A

takes the property absolute the do A or his nearest of kin A dies in the life time of the testator Upon the death of the testator the bequest to A s nearest of hin takes effect

(vi) Property is bequeathed to A for life and after his death to B or his heirs. B dies in the testator's life time. A survives the testator. Upon A's death

the bequest to the heirs of B takes effect

(in) Property is bequeathed to A for life and after his death to B or his heirs B dies in the testator's life time A survives the testator. Upon A's death the bequest to the heirs of B takes effect

Note -This section applies to Hindus Buddhists etc., see Sec 57 and Sch III

107 The object of this section is to prevent the legacy from lapsing by reason of the death of the legatee before the testator The general rule is that unless the legatee survives the testator the legacy is extinguished. But this general rule may be controlled by the manifest intention of the testator appearing on the face of the will that the legacy shall not lapse, and by his providing a substitute for the legatee dying in his lifetime-Sibley v Cost 1 Atk 572 Toplis v Baker 2 Cox 121 Re Greenwood [1912] 1 Ch 397 This where there is a bequest to A or to his personal representatives or to A or to his heirs the word or generally speaking implies a substitution so as to prevent a lapse-Gittings v Macdermott 2 M & K 69 Crooks v De Vanille. 9 Ves 197 Gibbs v Tait 8 Sim 132

Successive bequests and alternative bequests —If there are two successive bequests to A and B and the bequest to B is intended to take ext after the prior bequest to A has become exhausted then if the bequest to A becomes invalid by reason of his not being in existence at the death of the testator the bequest to B will also fail (See the Tagore case 9 BLR of PC at p 410) But if there are two alternative bequests to A and B if the bequest to A is invalid by reason of his not coming into being at the time of the testator's death the bequest to B will nevertheless be valid Thus! person bequeathed his property to his widows and after the death of the survival widow to R he then provided that Rs son would be the owner after R but that if R would die without leaving any son D would be the owner Belore the death of the surviving widow R died without leaving a son Held that the bequests to Rs son and D were alternative and not successive bequests and therefore although the bequest to Rs son was void no son having been had to R the bequest to D did not become void but took effect—Darskan \ Ha Khan 1929 ALJ 274 AIR 1929 AH 102 (103 104) 116 IC 30

1-197 Where property is bequeathed to a person, and words are added which describe class of persons but do not denote Effect of words des cribing a class added to them as direct objects of distinct and bequest to person independent gift such person is entitled to the whole interest of the testator therein, unless a contrary intention appear

by the will

10n 84

X of

## Illustrations

(1) A bequest is made-

bed lest is made—
to A and his children
to A and his children by his present wife
to A and his heirs to A and his heirs
to A and the heirs of his body
to A and the heirs male of his body
to A and the heirs male of his body
to A and his sissue
to A and his farmly
to A and his farmly
to A and his representatives

to A and his personal representatives. to A his executors and administrators In each of these cases A takes the whole interest which the testator had in the property

(n) A bequest is made to A and his brothers. A and his brothers are jointly entitled to the legacy

(iii) A bequest is made to A for life and after his death to his issue. At the death of A the property belongs in equal shares to all persons who then answer the description of issue of A.

Note -This section does not apply to Hindus Buddhists Sikhs and Jainas

108 Where an Indian Christian by his will gives his property to his daughter and her children the former takes an absolute estate. It is not intended that the daughter will take an interest for life after which the estate will go to the children absolutely. Such a construction is contrary to this section because the daughter's children are not the direct objects of a distinct and independent gift—Agnes v Murray & Co. 11 OLJ 459 AIR 1925 Oudh 24 (27) 79 IC 1026 C Il Illustration (i)

The use of the words male herrs in a will do not import any limitation According to the rule of construction land down in this section as to wills such an expression in a will must be rejected as having no effect in the absence of a contrary intention—Dadabhai v Coacayi 47 Bom. 349 77 IC 83 AIR 1923 Bom. 177 affirmed by the Privy Council in AIR 1925 PC 306 94 IC 535 A direction that a fund shall be received and enjoyed not only by the legatees but that the same shall be inherited by any children of them hereafter from time to time and from one generation to another in accordance with all legal rights has the effect of giving to the legatees the whole interest of the testator in the fund under this section. It gives an absolute interest in the fund to the legatees the words from generation to generation do not mean that the intention is to create a succession of life interests in the fund—Administrator General v Money 15 Mad 448 (467 468)

Bequest to class of persons Section 85

Bequest to class of persons under general description only, no last of one to whom the words of the description applicable shall take the legacy

This section applies to Hindus Buddhists etc. see Sec. 57 and Sch. III

109 Bequest to a class —A gift is said to be to a class of persons when it is to all those who shall come within a certain category or description defined by a general or collective formula and who if they take at all are to take one divisible subject in certain proportionate shares—Pearks v Mosiley 5 App Cas 714 Anngsbury v Walter [1910] AC 187 The question whether a gift is one to a class depends upon the mode of the gift itself namely that it is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift to be ascertained at a future time and who are all to take in equal or in some other definite proportions the share of each being dependent for its amount upon the ultimate number of persons—Jarman on Wills 5th Edn Vol 1 p 232

Thus a bequest made to sons of sons or daughters of sons or widows of sons is a bequest to a class—Ahmpi v Alorani 22 Bom 533 II a gift is made to S with a direction that if the said S happens to be without descendants,

the male offspring of my daughter h shall enjoy the property equally held that the gift to the male offspring of h constitutes a gift to a class—Manyamar V Padmanabhayya 12 Mad 393 (400) Where a testator devised one fifth of ha landed properties to each of his four sons, and the remaining fifth part to his tay grandsons R and M and then directed that on the death of any or either of my said four sons or of the said R and M leaving male issue such male sist shall succeed to the share of his or their respective father or fathers held that the words such male issue shall succeed constituted a gift to a class—Said with the words such male issue shall succeed constituted a gift to a class—Said with the words such male issue shall succeed constituted a gift to a class—Said with the words such male issue shall succeed constituted a gift to a class—Said with the words such male issue shall succeed on stituted a gift to a class—Said with the words such male issue shall succeed on the state of the said of the

A gift to a class may be none the less a gift to a class because some of the individuals of the class are named. For example if a gift is made to all synephews and nueces each of these would be a class gift.—Kingsbury \(\frac{1}{2}\) Hold [1901] AC 187 (192) In re Jackson 25 Ch D 162 Where the gift is four named daughters and all the after born daughters of the testator it is a gift to class—Re Stahope's Trust (1839) 27 Beav 2QT But in order to constitute a named person a member of a class he must have a common character with the number of the class—Re Featherstones Trust 2 Ch D 11 So 3 bequest to a brother for hife and at his death to be equally divided amongs has surviving children and my niece R W is not a gift to a class—Drakeford 33 Beav 48

Where a testator bequeathed a certain sum in equal shares to my grand children by my said late daughter E W also to my grandson F W M and to his step brother C W his step brother G W M it was held that the bequest to the children of E was not a gift to a class but to them individually because the testator space of them as my grand children by which he must be taken to have had in his minds eye such grand children as were then living—Administrator General Money 15 Mad 448 (466) A direction in a will that N with his wil and children shall live in the house for ever was held to be not a gift to a dash because the benefit which each member of the class took in this case was in 10 way dependent on the number of the children but each had a distinct and independent right to reside in the house and the number of persons who might ultimately helper to ultimately belong to this class would be in no sense regarded as a criterion of the interest which each took—Krishna Nath v Atmaram 15 Bom 543 What a testator bequeathed certain property to his three grand daughters A B and C by name held that they took not as a class but as personae designate and but the share of one of them who predeceased the testator lapsed and fell min the residue—Sallay Mahomed v Dame Janbai 3 Bom L R 785 Where the bequest to the testators are the beginning to the testators. is to the testator's sons wife for life with remainder to her two daughters, the gift is not to a class but to individuals and a third daughter born before the death of the testator is not entitled to a share of the remainder—Moladia Kanualal 17 Roma I Form Comments Kanuala 17 BomLR 705 30 IC 915 A gift to a class implies an interface of the remainder—McGanual 18 BomLR 705 30 IC 915 A gift to a class implies an interface of the remainder o to benefit those who constitute the class and to exclude all others but a fit to individuals described but a fit. to individuals described by their several names and descriptions, though they may together constitute a class, implies an intention to benefit the individuals named. In a gift to a class you look to the description and inquire what individual answer to it and those who do answer to it are the legatees described by Lord Cottenham in Barber v Barber 3 My & Cr 688

Section 86

# Construction of terms 99 In a will-

(a) the word "children" applies only to lineal descen1865
dants in the first degree of the person whose "children" are

spoken of,

(b) the word "grandchildren" applies only to lineal descendants in the second degree of the person whose "grandchildren" are spoken of,

(c) the word "nephews" and "nieces" apply only to children of brothers or sisters,

(d) the words "cousins," or "first cousins," or "cousinsgerman," apply only to children of brothers or sisters of the father or mother of the person whose "cousins," or "first cousins," or "cousins-german" are spoken of,

(e) the words "first cousins once removed" apply only to children of cousins-german, or to cousins-german of a parent of the person whose "first cousins once removed" are

spoken of,

(f) the words "second cousins" apply only to grand-children of brothers or of sisters of the grandfather or grandmother of the person whose "second cousins" are spoken of.

(g) the words "issue" and "descendants" apply to all lineal descendants whatever of the person whose "issue" or

"descendants" are spoken of,

(h) words expressive of collateral relationship apply alike to relatives of full and of half blood, and

(1) all words expressive of relationship apply to a child in the womb who is afterwards born alive

the womb who is afterwards born alive

This section does not apply to Hindus Buddhists, Sikhs and Jamas.

The italicised words have been added to express the meaning more clearly—Report of the Joint Committee

Words expressing re in a will, the word "child," the word Act of

Words expressing re a will, the word "child," the word latonship denote only son," the word "daughter," or any legitimate relatives or failing such relatives reputed legitimate.

understood as denoting only a to be understood as denoting only a son.

legitimate relative, or, where there is no such legitimate relative, a person who has acquired, at the date of the will, the reputation of being such relative

#### Illustrations

(t) A having three children, B C and D of whom B and C are legitimate and D is illegitimate leaves his property to be equally divided among my children The property belongs to B and C in equal shares, to the exclusion of D

(a) A having a niece of illegitimate birth, who has acquired the reputation of being his niece and having no legitimate niece bequeaths a sum of money to his niece. The illegitimate niece is entitled to the legacy

(111) A having in his will enumerated his children and named as one of

tin) A naving in his will enumerated his children and named as the will be them B who is illegitimate leaves a legacy to my said children. B will be a share in the legacy along with the legitimate children (iii) A leaves a legacy to the children of B b is dead and has left note but illegitimate children. All those who had at the date of the will acquired the reputation of being the children of B are objects of the gift.

(iv) A bequeaths a legacy to the children of B B never had any legit mate child. C and D had at the date of the will acquired the reputation being children of B. A then the date of the will acquired the reputation of the significant of the will acquired the reputation of the significant of the will acquired the reputation of the significant of the will acquired the reputation of the significant of the will acquired the reputation of the significant of the will acquired the reputation of the significant of the will acquired the reputation of the significant of the will acquired the reputation of the significant of the will acquired the reputation of the significant of the will acquired the reputation of the significant of the will acquired the reputation of the will be significant.

being children of B After the date of the will acquired the reputation of being children of B After the date of the will and before the death of the testator E and F were born and acquired the reputation of being children of B Only C and D are objects of the bequest (11) A makes a bequest in favour of his child by a certain woman not his

wife B had acquired at the date of the will the reputation of being the child of

A by the woman designated B takes the legacy
(vii) A makes a bequest in favour of his child to be born of a woman who never becomes his wife. The bequest is void

(viii) A makes a bequest in favour of the child of which a certain woman not married to him is pregnant. The bequest is valid

Note —This section does not apply to Hindus Buddhists Sikhs and Jamas

110 Exceptions to this section —An illegitimate child will be con prised in children when there is a designatio personal—Beachtroft v Beachtroft 1 Maddock 430 Thus under a gift to the children of A namely B C and D B is illegitimate he will still take under the gift—Meredith v Fair 2 Y & C C If a gift to the children of a deceased person who had only illegitumate children and they were known to the testator they will take under the git-Lord Woodhouse v Daltymple 2 Mer 419 If a gift is to children but that is only one legitimate child and several illegitimate children known to the testalor the latter will be included otherwise it will be impossible to give a meaning of the word children in the plural—Gill v Shelley 2 Russ & M 336 Where st unmarried person gave certain property to his mistress S and to her sons by his in these terms The property is given to S for her life and after her death the sons and heirs of me shall come into possession of the property It shall be in concern of mine held that the provision that the property was to be no concern of the testator showed that the illegitimate sons were meant and that the properly should go to them after the death of the mistress—Udit Singh v Amar 23 IG 348 (Cal)

Rules of construction where will purports to make two bequests to

on 88 X of

101 Where a will purports to make two bequests to the same person, and a question arises whether the testator intended to make the second bequest instead of or addition to the first, if there is nothing

same person in the will to show what he intended, the following rules shall have a free will be shall have a free with the shall have a free shall have effect in determining the construction to be put upon the will -

(a) If the same specific thing is bequeathed twice to the same legatee in the same will or in the will and again in the coded, he is entitled to receive that specific thing only

(b) Where one and the same will or one and the same codicil purports to make, in two places, a bequest to the salt person of the same quantity or amount of anything, he shall be entitled to one such legacy only

(c) Where two legacies of unequal amount are given to the same person in the same will, or in the same codicil,

the legatee is entitled to both

(d) Where two legacies, whether equal or unequal in amount, are given to the same legatee, once by a will and the other by a codicil, or each by a different codicil, the legatee is entitled to both legacies

Explanation —In clauses (a) to (d) of this section, the word "will ' does not include a codicil

## Illustrations

(i) A having ten shares no more in the Imperial Bank of India made his which contains near its commencement the words. I bequeath my ten shares in the Imperial Bank of India to B. After other bequeats the will concludes with the words and I bequeath my ten shares in the Imperial Bank of India to B. B is entitled simply to receive A's ten shares in the Imperial Bank of India to C. the diamond ring which was given by B. A after sards made a conclusion of the diamond ring which was given by B. A after sards made a conclusion of the conclusion of the

in the same will repeats the bequest in the same words. B is entitled to one legacy of 5000 rupees only

(ii) A by his will bequeaths to B the sum of 5000 rupees and afterwards in the same will bequeaths to B the sum of 5000 rupees. B is entitled to receive 11 000 rupees

(v) A by his will bequeaths to B 5 000 rupees and by a codicil to the will he bequeaths to him 5 000 rupees. B is entitled to receive 10 000 rupees. (vi) A by one codicil to his will bequeaths to B 5 000 rupees and by another codicil bequeaths to him 6 000 rupees. B is entitled to receive 11 000

(iii) A by his will bequeaths 500 rupees to B because she was my nurse and in another part of the will bequeaths 500 rupees to B because she went to England with my children. B is entitled to receive 1000, rupees

(tm) A by his will bequeaths to B the sum of 5000 rupees and also in another part of the will an annuity of 400 rupees. B is entitled to both legacies.

(ix) A by his will bequeaths to B the sum of 5000 rupees and also be quently to him the sum of 5000 rupees if he shall attain the age of 18 B is entitled absolutely to one sum of 5000 rupees and takes a contingent interest in another sum of 5000 rupees.

Note -This section applies to Hindus Buddhists, etc. see Sec. 57 and Sch III The rules in this section are copied from Williams on Executors (11th Edn ) Vol II p 1035

A residuary legatee may be constituted by any Section 89 Constitution of rest words that show an intention on the Act X of duary legatee part of the testator that the person designated shall take the surplus or residue of his property

#### Illustrations

(1) A makes her will consisting of several festamentary papers, in one of which are contained the following words — I think there will be something left, S-18

n 90 of

TIII INDIAN SUCCESSION ACT

after all funeral expenses, etc. to give to B now at school towards equipment of the B is constituted to B is constituted to a school towards equipment of the B is constituted to a school towards equipment of the B is constituted to a school towards equipment of the school towards equi (a) A makes his will with the following passage at the end of it — 1 below the followi

there will be found sufficient in my banker's hands to defray and disting any darker's hands to defray and disting any banker's hands to defray and distinguished to here our text also any the second of her our text also any text also there will be found sufficient in my banker's hands to defray and disease, which I hereby desire B to do and keep the revidue for her own the addebts which I hereby desire B to do and keep the residue for her unit which I be constituted the residuary legalet certain stocks and find which he bequeaths to C B is the residuary legalet

Note This ection applies to Hindus Buddhists, etc., see Sec. 57 ad Sch III

ary to constitute a residuary legatee — to particular mode of expression is made testator has about a residuary legatee. It is sufficient if the intention of the Residuary legatee \_\o particular mode of expression is necessary testator be plainly expressed in the will that the surplus of his estate at Dayment of debts and legacies shall be taken by a person theren despaties of the state of the st Mand \ Lamb 2 Jac \ W 309 Hearne \ Wiffenson therein designment of Pour 2 Pour 200 | W 309 Hearne \ Wiffenson therein designment of Maddock 120 Flows

Thus, the following terms of bequests have been held sufficient to constant a residuary legatee. I think there will be something left after all Lea expenses being paid to give W B now at school towards equipping him to k. Profession he may hereafter be appointed to —Leighton v Ballie 3 M & h. 227 I guess there will be found sufficient in my bankers hands to delay and discharge my dobts. Which would sufficient in my bankers hands to delay and a guess there will be found difficient in my bankers hands to denry addischarge my debts which I hereby desire E M to do and keep the residence of the roun tree and alarmed hereby desire E M to do and keep the residence one-toughte my depth which I hereby desire E M to do and keep the tourn use and pleasure — Boys 1 Morgan 9 Stm 289 After these legand After the legand to the state of the sta and my doctor's bills and funeral expenses are paid I leave to my sister which any power or control of the second state of the second state of the second state of the second state of the second seco any poper or control of her husband—Re Bassets Estate LR. Heg Should there he are constant to the husband—Re Bassets Estate LR. Heg St. Should there be any surplus after the above expenditure —Duarks v Burnish 4 Caj 443 After all these acts have been observed from the process of said property of these facts have been observed from the process of shortens. said property if there he a surplus, then the family will be supported therefore -Ashulosh Durga Charan 5 Cal 438

Under a residuary bequest, the legatee is entitled Property to which to all property belonging to the tests residuary legatee

tor at the time of his death, of which tary disposition which is capable of taking effect he has not made any other testamen

118 A by his will bequeaths certain legacies of which one is void under sembles property to Hapses by the death of the legacie to which one is void under semble belongs to him at the time date of his will A purchase, a zamondari shall be cannindari as part of residue.

B is entitled to the two legace and A by his will bequeaths certain legacies of which one is loid under settled and another lapses by the death of the location. He bouncaths the reside #

Note — This section applies to Hindus Buddhists etc. see Sec 57 20 Sch III It is based on sec 25 of the English Wills Act 1937 (1 Vact. c. ab.

the residuary legatee is nominated generally he is entitled in that characte whatever may fall into the residue after the sentitled in that characte when the sentitled in the sentitle in the sentitled in Property to which re-iduary legatee is entitled when the standary legatee is entitled when the standary legatee is entitled. whatever may fall into the residue after the making of the will by lagse and disposition or other accident. Joekson when the making of the will by lagse and the making of the will be lagse. disposition or other accident—Jackson v Kelly 2 Ves Sen 285 Cambridge 1 Smith v Fitzeroods 2 Ves Sen 285 Cambridge 2 Ves Sen 2 we produced or other accodent—Jackson v Kelly 2 Ves Sen 282 Combined or by accountement abbasement of \$1. \$8.83 Leake v Robinson 2 Ves Sen 282 Combined to \$1.00 to \$ Acus o ves 12 Smith v Fuzgerald 3 V & B 3 Leake v Robuson 2 and Madd A12 Hearne v II register as 2 sec. 13 sec. 13 sec. 13 sec. 13 sec. 13 sec. 13 sec. 14 sec. 15 sec

1

A residuary bequest of personal estate carries not only every thing not disposed of but everything that in the event turns out not to be disposed of-Cambridge v Rous 8 Ves. 12 (25) The residuary legatee takes not only what is undisposed of by the expression of the will but that which becomes undis posed of at his death by disappointment of the intention of the will-Jones v Muchell 1 Sim & Stu 294 So also where a testatrix by mistake recited in a will that she had settled upon A a particular property which in fact was still at her disposition and the will contained other recitals and bequests of other properties and also a residuary bequest in favour of \( \) it was held that the property mentioned in the recital passed under the residuary gaft to A-Re Bagot [1893] 3 Ch 348 Where the gift is a gift of the residue subject to particular gifts which fail they will fall into the residue even though the failure does not arise from the contingency mentioned in the will-Re Meredith's Trusts 3 Ch D 757 A testator directed that his property should be divided among his children J C and F or the survivors or survivor of them and made a residuary bequest in favour of his wife. The bequest to J could not take effect by reason of his having attested the will (sec 67) It was held that Is share would not pass to C and F according to the terms of the will because the words or the survivors or survivor of them would not apply to the present case as Js incapacity to take was not due to his death but to some other cause (attestation of the will) which was not contemplated by the testator Consequently Js share would fall into the residue under this section-Camani v Barefoot 26 Mad 433 (435 436) Where a testator devised a specific immoveable property to B for life only and later directed his executors to sell the residue of this immoveable property and make over the proceeds thereof to a university held that the reversion in the property devised to B for life passed on his death under the specific residuary devise to the university-Manorama v Kalichurn 31 Cal 166 8 CWN 273

The word property in this section embraces both moveable and immoveable property—Mun Molun v Puresh Nath 22 W R 174

A property which is the subject matter of a trust which is incapable of taking effect prima facie falls into the residue unless the testator had sufficiently expressed an intention that the property was not to fall into the residue-Fanundia v Administrator General 6 CWN 321 To prevent personal property from falling into the general residue there must be found in the will an expression of the testator's intention not only to except such property either from the operation of the will or from the operation of the residuary clause in the will in favour of a particular recip ent but an intention to except it from the operation of the will or the residuary clause (as the case may be) whether the proposed recipient in the events which happen can take the property or not. There must be found in the will the intention that whether the proposed recipient can take the property or not it shall never fall into the general residue-per Smith L.J. in Re Bagot [1893] 3 Ch 348 The residuary gift carries every lapsed legacy and every legacy which on any ground fails to take effect but if a testator has shown some intention with regard to the excepted property inconsistent with its ever falling again into the residue effect must be given to that intention-Blight V Hartnoll 23 Ch D 218

Where funds stand in Court to the credit of a separate account they become scenared from the general estate. The interest accruing on such funds does not form part of the residue but goes so as to increase the funds in Court—Administrator General v Belchambers 36 Cal 261 (265) 11C 944 Where a testator made certain dispositions in a will and gave directions as to the residue of the

properties and at the time of the will there was a fund in Court to the credit of the testator but unknown to him held that the amount was not to be included in the residuary clause but it went to the heirs as on an intestacy-humikal ammal v Suryaprahasaroya 38 Mad 1096 29 MLJ 682 31 IC 494

Undisposed of residue - If a will fails to make an effectual and complete disposition of the whole of the testator's real and personal estate, of course the undisposed of interest whether legal or equitable devolves to the person or persons on whom the law in the absence of disposition casts that species of property -Jarman on Wills (6th Edn.) p 714 In the absence d any residuary bequest the heir of the testator is entitled to all property belongs, to him at the time of his death of which he has not made any testamentary disposition capable of taking effect—Vundrai andas v Cursondas 21 Bom 86 (651) Morarji v Nenbai 17 Bom 351 (355) Lallubhai v Mankui atbai 2 Bon 388 (406) Damodardas v Dayabhas 21 Bom 1 (15) Kedar Nath v And Krishna 12 CWN 1083 Kunjamoni v Nikunji 20 CWN 314 32 IC 82 Motilal v Gourishankar 12 Bom LR 917 Even the bequest of a portion of the estate to the heir does not exclude him from the undisposed of residue Toolseydas v Premn 13 Bom. 61 (69) Lallubhas v Mankutarbas 2 Bom. 38 (410 412)

Share of Residue and Specific Bequest —A share of residue dos not stand on the same footing as a specific bequest. In Tretheus v. Hdy 4 Ch D 53 (1876) Sir George Jessel observed It appears to have been lost settled law that there is no residue of personal estate until after payment of the debts funeral and testamentary expenses and all costs of the administration of the estate of the testator Therefore until you have paid the costs you do not arrive at the net residue at all and when you do arrive at it it is distributed It is with reference to that passage according to law That is the principle that Younger LJ says in the Dr Barnardo's Homes case 1 KB 468 (1930) the principle is that until the residue is ascertained and until its existence by net residue has been acknowledged either by payment to the residuary legals or if the residue be settled by the appropriation of a fund to meet the settled residue the residuary legatee has no interest in any specific part of that while subsequently becomes residue as a specific fund but that his right is, until that amount of time arrives subject of course to any interim distribution to the estate administered in due course. In the same case before the House Lords Barnardo's Homes & Special Income Tax Commissioners 2 AC 1 (1921) the same principle was upheld following Lord Suddleys case, (1891) AC 11 It is laid down that the legatee of a share in the residue has no interin any of the property of the testator until the residue has been ascertained a Lord Atkinson says that Lord Sudcley's case (1897) AC 11 conclusively cash hished that until the claims against the testator's estate have been settled, by residue does not come into actual existence. It is a non existent thing until the event has occurred The probability that there will be a residue is not enough It must be actually ascertained

It a legacy is given in general terms, without 104 specifying the time when it is to be paid the legater has a vested interest Time of vesting le in it from the day of the death of the gacy in general terms, test iter and it he dies without having received it, it shall pass to his representatives

Section 91 Act X of 1865

This section applies to Hindus Buddhists etc., see Sec 57 and Sch III

Vesting of an estate —The general rule of law is in favour of the vesting of an estate. The ordinary meaning of the word vest means vest in interest. As was said by James L.J. in In re Despitions Scilled Estates L.R. 2. Ch. D. 783 at p. 785 (1876) — The Court leans strongly in favour of the early vesting of interests in cases where the effect of holding the share of a child of the testator to be contingent on his living to a future period would be that if he died before that period leaving a family his children would take no benefit under the will

A testator bequeathed his property to his wife for life and after her death to vest in my sons or their heirs who may then be in existence. It was added that the sons would not be entitled to the and estate during the life time of the wife until the marriage of the unmarried daughters and until the youngest son attained the age of 25. It was held that under the terms of the will the estate was to vest in the sons is vest in interest after the death of the widow and during her life time their interest was only a contingent interest—Genesh Prosed v Monaharial 43. CWN 480.

114 If a legacy as given generally without specifying the time when it is to be paid it is due on the death of the testator though not payable till the end of a year next after the testators death (see 337). Hence if the legatee happen to die within the year his personal representatives will be entitled to the legacy—Williams on Executors, (11th Edn) Vol II p 973.

Thus section provides for the vesting of the estate in the legatee from the date of the testator's death. But the estate thus vested is not full or absolute the reference is only to an interest in the legacy not the legacy test. There is a distinction between a vesting in interest and vesting in possession (see sec 119). A legacy vested in the legatee under this section may be divested by his disclaimet—Lakshmma v Rainamma 38 Mad 474 (477 478) 25 MLJ 556 21 IC 688 In other words the assent or acceptance by the legatee is essential and the legacy cannot vest in him against his viill—bible. If I make a conveyance of land to a person in my life time or leave him any property by my will he may if he pleases disclaim taking it and in such cases it will not vest in him against his will —williams Real Property (20th Edn.) p 84

Where the testator directed that his property should be divided in a certain mean among the legatese (viz. two aimas to his wife three aimas to each of his 3 nephews and five annas to T a residuary legatee) but after the testators death the legatees entered into a family arrangement under which they were to receive the property in a different proportion from that mentioned in the will (viz three aimas for the wife one aima for each of the 3 nephews and 10 aimas for T) and the residuary legatee having died before he received the legacy his mother as his heries and legat representative applied for the legacy it was held that she was entitled to get it and the fact that she claimed under the family agreement so far as the quantum of the share was concerned made no difference because the effect of the agreement was not to supersede the will itself, in fact her right took its roots in the will and T had not ceased to be a legatee under the will might of the family arrangement Consequently thus section applied—Secretary of State v Parijat 60 Cal 1135 37 C WN 709 A IR 1933 Cal 841 (883)

A bequest becomes vested in the devisee on the death of the testator although he may not be entitled to possession except in the proper course of administration and consequently the same is attachable in execution of a decree against the devisee although the legacy has not yet been actually paid to him

-Ramanuja V Saumi Pillai 22 M L J 228 13 J C 795 distinguishing (20d virtually dissenting from) Szirangammal v Sandammal 23 Mad. 216 (219) where it is aid that an heir has no saleable interest in the property inhinid by him until his share has been determined and allotted to him in the ourse of administration

Section 92 Act X of 1865

(1) If the legatee does not survive the testator, the legacy cannot take effect, but shall In what case legacy lapse and form part of the residue of lanses

the testator's property, unless it appears by the will that the testator intended that it should go to some other person

(2) In order to entitle the representatives of the legatet to receive the legacy, it must be proved that he survived the testator

# Illustrations

(1) The testator bequeaths to B 500 rupees which B ones me B one

before the testator the legacy lapses
(11) A bequest is made to A and his children A dies before the testation A and his children A dies before the testation A and his children A dies before the testation and his children A dies before the testation and the children A dies before the testation and the children or happens to be dead when the will is made. The legacy to A and his children lap es

(iii) A legacy is given to A and in case of his dying before the testator B A dies before the testator The legacy goes to B (iii) A sum of money is bequeathed to A for life and after his deta. In B A dies in the life time of the testator B survives the testator The bequest 5 B takes effect.

(v) A sum of money is bequeathed to A on his completing his eightenth year and in case he should die before he completes his eighteenth year and dies in the lifetime of the testator The kgst to A lapses and the bequeate to B. to A lapses and the bequest to B does not take effect

(vi) The testator and the legatee perished in the same ship wied. The is no evidence to show which died first. The legacy lapses.

Note -- This section applies to Hindus Buddhists etc see Sec. 21 8 d Sch III For construction of this section see Sch III para 5

115 Lapse of legacies —It has been established from the established periods that unless the legatee survive the testator the legacy is extinguished neither can the executor or administrators of the legatee demand the sme Williams on Executors (11th Edn) p 958 The liability of a testament gift to lapse or failure by reason of the decrease of its object in the test of the decrease of th life time is a necessary consequence of the ambulatory nature of wills which of taking effect until the death of the testator can communicate no benefit persons who previously die.—Jarman on Wills (5th Edn.) Vol I p 307 where a testator bequeathed his whole property to his brother and expend directed that neither his daughter nor his widow should take any share of his property and the brother predeceased the testator held that the testator is died intestate not having made any di position capable of taking effect is sole devisee having predeceased him-Erasha v Jerbai 4 Born. 537

Even in a ca e where legacy is given to a man and his executors admin trators and assigns, or to a man and his representatives, if the legate to before the testator thou, h the executors are named yet the legacy is because the words because the words executors administrators and assigns etc. are considered as only descriptions of the manufacture and assigns etc. as only descriptive of the interest bequeathed and those who take by interest by interest bequeathed and those who take by interest sentation only cannot be entitled to anything to which the person they represent never had title—Ethott v Davenport 1 P Wms 83 Corbyn v French 4 Ves 435 Shuttleworth v Greaves 4 My & Cr 35

A devise or bequest will lapse if the legatee be dead before the making of the will In such a case parol evidence is not admissible to show that the testator knew at the time of the making of the will that the legatee was dead so as to raise the presumption that he intended that there should be no lapse— Majobné v Brook's I Bro C C 84

The words unless it appears by the will etc show that the testator may prevent the legacy from lapsing by providing a substitute for the legatee dying in his life time. See Illustrations (in) and (iv). But in order to effect this object he must in clear words exclude lapse and he must clearly indicate who is to take in case the legatee should de in his life time—Broune v. Hope L. R. 14. Eq. 343. See Notes under see 96. It will not be enough if he merely expresses his desire that the legacy shall not lapse. Thus if a man devises his estate to J and his herrs and signifies his intention that if J die before him it should not be a lapsed legacy. Yet unless he had nominated another legatee the heir at law of the testator is not excluded notwithstanding the testator's declaration—Sibley v. Cook. 3. Ath. 572.

Legacy does not lapse if one of two joint legatees die before tes tator 106 If a legacy is given to two section 93 persons jointly, and one of them dies act X of before the testator, the other legatee takes the whole

#### Illustration

The legacy is simply to A and B A dies before the testator B takes the legacy

116 This section applies to Hindus Buddhists etc. see Sec 57 and Sch III

The Illustration seems to lay down that a bequest simpliciter to two persons creates a joint trainery between them. But this rule is quite foreign to the Hindu law under which in case of a joint gift the Courts lean strongly in favour of a tenancy in common. See notes under the next section.

Bit in ca e of Christians a joint tenancy is presumed rather than a tenancy in common See Arakal J Gabriel v. Dominigo Inca 34 Mad. 80 (81) 20 MLJ 377 6 IC 7 Difference in the dates of handing over the management of the property by the donor to the several donees creates no presumption in favour of a tenancy in common as the vesting of the property takes place on the same date and the beneficial enjoyment of all commences at the same time—Ibid.

107 If a legacy is given to legatees in words which section 94 show that the testator intended to give det of them distinct shares of it, then, if any legatee dies before the testator, so much of the legacy as was intended for him shall fall into the residue of the testator's property

#### Mustration

A sum of money is bequeathed to A B and C to be equally divided amorg them A dies before the testator B and C will only take so much as they would have had if A had survived the testator

Note -This section applies to Hindus Buddhists etc., see Sec. 57 and Sch III

Joint tenancy and tenancy in common -The principle of 117 joint tenancy as obtaining in England is quite foreign to the Hindu law and when property is gifted to more persons than one in the absence of anything that grant to the contrary the presumption is that the donees take as tenants a common-Jogeswer v Ramchandra 23 Cal 670 (679) (PC) (overruing 176 nada v Nagammal 11 Mad 258) Navron v Perozbas 23 Bom 80 (4) Hirabat V Lakshmibat 11 Bom 573 Yethirajulu V Mukunthu 28 Mad M (375) Damodardas v Dayabhas 21 Bom 1 (15), Ram Piars v Kristins S All 600 (602) 19 A L J 608 Rameshar v Rukmin 14 OC 244 12 IC 7 (774) The principle of joint tenancy appears to be unknown to Hindu la except in case of coparcenary between the members of an undivided family Iogesuar v Ramchandra supra

The English rule that a bequest in favour of two persons without spends tion of their shares is taken by them jointly has not much reason to commend The natural presumption is that they are intended to take in equal short and when the estate bequeathed is one of inheritance it is far more resumble to suppose that each legatee and his heirs are the objects of the testators board than that he intends that the legatees should take by survivorship and the of the last surviving legatee should take the whole—Bhobatarini v Pray L 24 Cal 646 (653) And in fact the tendency of the Court is to lean \$4.51 joint tenancy in the construction of a will—Administrator General v. Morth b.

Mad 448 (469)

The question of tenancy is one of intention to be ascertained with related to the terms of the particular will If the grant is to persons who are included of forming a constitution of forming a constitution. of forming a joint Hindu family they can take only as tenants in common, he on the contrary the grant is to persons who constitute such a family experience the trimal resources. the prima face view is that they take in severally and those who argue in the of the opposite construction will have to show some clear foundation for it is terms of the will. terms of the will-1 ethnajulu v Mukunthu 28 Mad 363 (373) where the donees are the sons and grandsons and would succeed to the provent of the testator in the absence of any testamentary disposition and take property as ancestral property the presumption may be drawn where the issulent as to the matter. is silent as to the nature of the estate conferred that they would take it is unobstructed benterunobstructed hentage with the same incidents as would follow if there with will. But where the But where the donces though members of a joint undivided family stated to the testator of the festivery and the festivery of not related to the testator or though related to him would in the about any will either immediately any will either immediately or at a later stage take the property as downward heritage and only as tenants. heritage and only as tenants in common there is no reason for applying the symptom that the sumption that the testator by devising the property to them intended that the hould be a joint tenance. hould be a joint tenancy. Where there is nothing in the will to show discovery and clearly that the beque t was to the family and not to the individual mechanical thereof separately the thereof separately the ordinary presumption that when there are said by a donces they take as tenants-in common, applies—Janakiram 1 No anist Vad 48 .0 MLJ 413 93 IC 662 VIR 1920 Vad 273 (278, 279) where a Hindu bequeathed his property to his two married daughters and it was not unlikely that the te ta or had given the property to the day

in joint tenancy since the married daughters cannot constitute a joint family consequently they took the property as tenants-in common and on the death of one of them her heir succeeded to her share and the property did not pass to the other daughter by survivorship-Gops v Jaldhara 33 All 41 (44) 7 ALJ 911, 7 IC 697 Where the property was devised to two persons who were brothers and were at the time living jointly with their father and others it can hardly be supposed that the testator intended that the property was to be held by the donces as undivided coparceners so as to benefit any other members of the joint family-Aishore v Mundra 33 All 665 (676) 8 AI J 757 10 IC 565 Cf Bai Diuali v Patel 26 Born. 445 (448) 4 Born L R 102 (case of gift) A devise of property made by a maternal grandfather in favour of his daughter s sons has the effect of creating a tenancy in common and not a joint tenancy-Ram Piars , Krishna 43 All 600 (602) AIR 1921 All 50 dissenting from Mankanima v Balkishan 28 All 38 Where the testator provided in the will that his daughter and son in law should succeed to the entire property and that they were to be owners and hears to the property in every way held that the legatees took as tenants in common and not as joint tenants-fio v Rukuran 8 Lah 219 100 IC 54 AIR 1927 Lah 126 (127) Sankaranarayana y Koppaya 23 LW 81 AIR 1926 Mad 236 (238) 91 IC 973

Where a money leagey or a residue is given to more persons than one by any mode of expression which denotes a severance the legatees will be tenants in common as where the gift is to A and B share and share alike (Heathe v Heathe 2 Atk 122) or in equal shares (Brown v Oakshott 24 Beav 254) or equally to be divided between them (Bryan v Turgg LR 3 Eq 433) or between them (Lashbrook v Cock 4 Mer 70) Williams on Executors (11th Edn ) p 1206 Thus a bequest to my grandsons A B C and D the sons of my late son M their and each of their respective heirs share and share alike." was held to be a gift to them in severalty and as members of a divided family-Ganpal V Lakshmibas 5 BHCR (OC) 128 Where a testator become the income of his property to his two sons in equal shares half and been seen that they took it only as tenants in common—Damodardas v Dayable I Born 1 (15) A gift in a will to E F and G in equal shares was been if ce it Mad 448 (469) Where a testator bequeathed a 4 annas scare of a Terminary to his widow and her son for their maintenance I cld .... The Die it as tenants in common each taking a 2 annas share—Josesses T Len Commen 22 shares clearly indicates that the brothers are to ce is and not as joint tenants-Har Prasad , Subder - II == Id - II ALI 263 28 I C 561

Tenancy in common is also created by it is a four anamor This where a Hindu bequeathed to his nephra and wile with with priver of ahenation and the nephew abenated the and that and a constant severed the joint tenancy-Jogester v Rom Cumum I Cal at 1971, 198. Tenancy in common is also contemplated were the direct of the user are members of a joint family are to take direct of the property at commen periods—Shyambhas v Purush samusara TEV. The ELEC 1922 Made -

Instances of joint manoy the of put more where the bequest is to two The Land wat & Pents Lan In with or to widow and despited (En Harmer t Load Mark if Sont Where a testator ducted that will it was highles . I fe it it in annual



whoever might then remain as the son of the testator's brother should be the owner thereof and then by a subsequent clause in the will the testator declared that his nephews should be the owners of all his immoveable as well as his more able properties held that the devise of the nephews was a devise to them pontly and created a joint tenancy—Jairam v Kuverbhai 9 Bom. 491 (509) When a Parsi made a bequest to his wife and daughter for life with the remarker to the daughter's sons held that in the case of Parsis the rule of English law must be applied and the daughter's sons would take as joint tenants after the life estate of the widow and daughter-Navion v Perozbas 23 Bom 80 (97 98) Whom there is a bequest to two persons (eg two sons) who form members of a just Hindu family and from the will it is apparent that they are to take the properly simultaneously the presumption is that the grant is to them as co-partered and not as tenants in common—Shambhar v Purushothamadoss 21 LW 511 90 IC 124 AIR 1925 Mad 645 (653) So also Nagalingam , Ramshanith 24 Mad 429 (437) Yethtrajulu v Mukunthu 28 Mad 363 (373) Vinter ramiah v Subramaniam 16 MLT 489 26 IC 393 Indon v Kothepalli Rus chandra 10 LW 498 54 IC 146 Raja Rajesuara v Sundara 27 MLJ SA 27 I C 283

Bequest to a class —This section does not apply in cae of bequest to a class. The rule is that where a legacy is given to a class of persons in general terms as tenants in common as the children of A the doll of one of them before the testator will not occasion a lapse of any part of the fund but those of the described class who survive the testator will take the whole—Viner v Francis 2 Cox 100 Lee v Pain 4 Hare 250 Fell v Budaris. LR 10 CP 701 Re Jackson 25 Ch D 162 Where there is a gilt will number of persons who are united or connected by some common tie and you can see that the testator was looking to the body as a whole rather than to members constituting the body as individuals and so you can see that he intended that if one or more of that body died in his life time the survivors should like the gift between them there is nothing to prevent your giving effect to be wishes of the testator —per Lord Macnaghten in Kingsbury V Haller [32] AC 187 (191)

Section 95 Act > of 1865

108 Where a share which lapses is a part of the general residue bequeathed by the When lapsed share goes that share shall go as undisposed of as undisposed of

#### Illustration

The testator bequeaths the residue of his estate to A B and C to be experted between them A disc before the transfer of the tr ane testator bequeaths the residue of his estate to A B and C to be expected divided between them A dies before the testator. His one third of the R goes as undsposed of

120 Applicability —This section applies to Hindus, Buddhists, to see Sec. 57 and Sch III

Scope —Sec 108 embodies the English rule in testamentary matters, ke. as the rule in Skrymsher v Northcote 1 Swanst 566 and if a bequest fails in is an intestacy as to the lapsed share of the residue—Vedabala v Official Title of Brigal 22 Cal. 106-29. of Bongal 62 Cal. 1062 39 CWN 1154 A part of the residue of which its disposition fails will not appear to the residue of which its disposition fails will not seem to the residue of which its disposition fails will not seem to the residue of which its disposition fails will not seem to the residue of which its disposition fails will not seem to the residue of which its disposition fails will not seem to the residue. disposition fails will not accrue in augmentation of the remaining parts as feet but instead of residue of the remaining parts as Adv but instead of resuming the nature of a residue will devolve as undi pool of Skrymsker v resuming the nature of a residue will devolve as undi pool of Skrymsker v resumer v residue. Skrymsher v Vorthcole 1 Sv anst 566 Where there is a residuary because several persons as tenants-in common the share of one dying in the tenantslife-time does not pass because the testator having given to each a certain portion of his property according to their number it would not be consistent with such declared intention to give to the survivor a larger proportion-Easum v Appleford 5 M & Cr 56 (62) Where a testator bequeathed one third of the residue to the wife of an attesting witness which was void under sec 54 (now sec 67) of this Act it was held that such share should be dealt with under this section as not disposed of by the testator-Administrator General v Lazar Stephen 4 Mad 244 (246)

When bequest to tes-tators child or lineal descendant does not lapse on his death in testator's

109 When a bequest has been made to any child or Section 96 other lineal descendant of the testator, 1865 and the legatee dies in the lifetime of the testator, but any lineal descendant of his survives the testator, the bequest shall not lapse, but shall take effect as if the death of the legatee had happened immediately after the death of the

testator, unless a contrary intention appears by the will

# Illustration

A makes his will by which he bequeaths a sum of money to his son B for his own absolute use and benefit B dies before A leaving a son C who survives A and having made his will whereby he bequeaths all his property to his widow The money goes to D

Applicability ... This section applies to Hindus Buddhists etc 121 see Sec 57 and Sch III For construction see Sch III para 5

The provisions of this section being exceptional and made for a certain class of cases only were not previously applied to those places which were outside the scope of sec 2 of the Hindu Wills Act (Sec 57 of the present Act) did not therefore apply to a will executed outside the Presidency Town of Madras-Ramamirthan v Ranganathan 24 Mad 299 (305) or to wills executed by Hindus in Oudh-Ram Asshen v Stepal 9 OC 159 But the new clause (c) of sec 57 now makes this jection applicable to all wills executed on or after 1st January 1927 in all parts of India

Section based on English Wills Act -This section is based on sec 33 of the English Wills Act 1837 (1 Vict C 26) The effect of this section is to prolong the original donee's life by a fiction for a particular purpose that purpose is to give effect to the will in which the gift which would otherwise lapse occurs and it only points out the mode in which that effect is to be given-Jarman on Wills (5th Edn.) Vol I p 324 This enactment does not substitute the issue for the deceased legatee but gives the legacy to him absolutely as though he had survived the testator-Re Hone's Trusts 22 Ch D 663 and it is there fore disposable by the will of the legatee-Johnson v Johnson 3 Hare 157

Scope and Construction of the Section -Sec 109 only provides that in case of the legatee's death before the testator the bequest shall take effect as if the legatee's death had happened after the death of the testator. To prevent a lapse it has to be assumed that the legatee survived the testator. But the section does not provide that on such assumption being made only the lineal des cendants are to have the benefit of the bequest and not other hears. The bequest will take effect in favour of all the heirs of the legatee-Fakub Ahan v Azizun 11154, 11 Luck 376, AIR. 1935 Oudh 437, 155 IC 1076

This section is not in conflict with the Tagore case (9 BLR 377 PC) That case lays down that a person capable of taking under a will must, eith in fact or in contemplation of law be in existence at the death of the testalar Now under this section the legatee under the testators will although it. at the time of the testator's death must be treated as in exitence at that 12 in contemplation of law because a lineal descendant of his surines the tetal That being so the rule in the Tagore case is not in any way contrained-Jitu Lal v Binda 16 Cal. 549 (555) Thus where a testator gate a krst to his son's daughter who however died during the Life time of the testal leaving a female child who survived the testator, held that under this extent the child could recover the legacy left to her mother because the sons to the was in contemplation of law a person existing at the death of the texture since she left a child (lineal descendant) who survived the testator-/ilu ld ! Binda Bibi supra This section applies whether the legatee is named as executor or not A testatrix executed a will giving a legacy in favour of the son and appointing the son as her executor The on predeceased his min leaving a son behind Held that this section applied and the legacy od at lapse on account of the predecease of the son during his mother's lifetime by enured to the benefit of the grand on of the testatrix—Ramasamy i have samy 13 MLJ 351

Gifts to a class -This section does not apply to gifts to a class, because in case of such gifts the rule is that on the death of one of the member of class his share will go to the survivors See Note 119 under sec 107, will heading Bequest to a class.

Contrary intention -The contrary intention mentioned in this secmust expressly appear from the will The mere absence of express words r the legacy to the heirs of the legatee in case he predeceases the testa'or such words are used in the case of another gift in the same will is not to regarded as an expression of a contrary intention so as to make the legacy for the personal benefit of the legatee alone and lapse on his death below te.tator-Julu Lal v Binda 16 Cal 549 (554)

Lineal descendant -The term lineal descendant is not resulted male descendants only but is wide and comprehensive enough to include the conduction and comprehensive enough to include the conduction and comprehensive enough to include the conduction and the conduction and the conduction and the conduction and the conduction are conducted to the conduction are conducted to the conduction are conducted to the conduction and the conducted to di cendants male and female—Bhimnath v Tara 33 C W 837 (PC) 1929 PC 162 116 IC 608

Section 97 Act X of 1865

110 Where a bequest is made to one person lor 12 henefit of another, the legacy does at Beque t to 1 for benefit of B does not lapse lapse by the death, in the te tale, by As death lifetime, of the person to whom t

bequest is made

This section applies to Hindus Buddhists etc. see Sec. 37 and 5th III

Section 98 la Val 1844

Where a bequest is made simply to a deal, class of persons, the thing bequest Surveyab in case of because to described shall go only to such as are a class it the testator's death

I respition—It property is bequesthed to a class persons described is standing in a particular desire kindred to a specified individual, but their possession of it is deferred until a time later than the death of the testator by reason of a prior bequest or otherwise, the property shall at that time go to such of them as are then alive, and to the representatives of any of them who have died since the death of the testator

# Illustrations

(f) A bequeaths I 000 rupces to the children of B without saying when it is to be distributed among them B had died previous to the date of the will leaving three children C D and E E died after the date of the will be died to A C and D survive A The legacy will belong to C and D to the exclusion of the representatives of E

(ii) A lease for years of a house was bequeathed to A for his life and after his decease to the children of B At the death of the testator B had two children living C and D and he never had any other child Afterwards during the lifetime of A C died leaving E his executor D has survived A D and E are jointly entitled to so much of the lease holder term as remain surexpired.

(iii) A sum of money was bequeathed to A for her life and after her decease to the children of B At the death of the testator B had two children living C and D and after that event two children E and P were born to B C and E died in the life time of A C having made a will E having made no will A has died leaving D and F surviving her The legacy is to be divided into four qual parts, one of which is to be paid to the executor of C one to D one to the administrator of E and one to F.

(iv) A bequeaths, one-living of his lands to B for his life and after his

(19) A bequeaths one-thurd of his lands to B for his life and after his decease to the sisters of B. At the death of the testator B had two sisters living C and D and after that event another sister E was born. C died duning the life of B. D and E have survived B. One third of A s lands belongs to D. E. and the representatives of C in equal shares

(9) A bequeaths 1000 rupees to B for hie and after his death equally among the children of C Up to the death of B C had not had any child The bequest after the death of B is your

the useful of B is void (1) A bequesths I 000 rupees to all the children born or to be born of B to be divided among them at the death of C. At the death of the testator B has two children living D and E. After the death of the testator but in the lifetime of C is no other children F and G are born to B. After the death of C another child is born to B. The legacy belongs to D. E. F and G to the exclusion of the after born child of B.

(18) A bequeaths a fund to the children of B to be divided among them when the eldest shall attain majority A the testators death B had one child living named C He alterwards had two other children named D and E E died but C and D were living when C attained majority. The fund belongs to C D and the representatives of E to the exclusion of any child who may be born to B after C a training majority.

Note -This section applies to Hindus Buddhists etc. see Sec 57 and Sch III For construction of this section see Sch III para 5

The old section (98) contained another Illustration viz - (b) A be queaths a legacy to the children of B At the time of the testator's death B had no children. The bequest is youd

This Illustration has been omitted as it might give the impression that a child in the womb is excluded which is not the existing law - Report of the Joint Committee

Principle -This section is based on the principle that a bequest in favour of a person not in existence at the time of the testator's death is void And so where a Hindu declared by his will that after his death his estate should be divided among his daughters and then after the death of a daughter, having sons the estate is to be divided among the surviving daughter and the smd the deceased daughter it was held that those sons of the deceased daughter who were not born at the time of the testators death could not take Bit tr bequest to the daughters sons as a class would not become void by reason of the incapacity of some of them (ie for not being born at the time of the testath incapacity of some of them (ie for not being born at the time of the testath cath)—Radha Prosad v Ranimonii 38 Call 188 (199 200) affirmed on speal Ranimonii v Radha Prasad 41 Call 1007 (1012) (PC) See also see the

The primary duty of the Court is so to construe the will as to carry of are as possible the intentions of the testator and if the Court come to the conclusion that the testator had the primary intention of benefing all the members of a class and if such intention fails by reason of its benig oil, if the Court can deduce a secondary intention that at least such members of the class should take as were in existence at the time of the testators death the effect should be given to such secondary intention. It must be inferred the testator meant that such members should take rather than that his infinite should be defeated altogether—Ehimny in Morary 22 Born 53 (539). Merging das v Tribhuvandas 15 Born 652 (656). Krishna Rao v Benabei 20 Born 53 (6592).

The testator may be considered to have a primary and a secondary miles tion His primary intention is that all the members of the class shall take and his secondary intention is that if all cannot take those who can shall do so -In to Coleman 4 Ch D 169 Where the intention of the donor is to make gift to two named persons capable of taking that gift although it is also intention that the other persons unborn at the date of the gift should alternate come in and share therein that part of the gift which is capable of taking gift should be given effect to although the intention of the donor cannot be came out in its entirety. As a general rule where there is a gift to a class some d whom are or may be incapacitated from taking because not born at the at of the gift or the death of the testator as the case may be and where that s no other objection to the gift it should enure for those members of the char who are capable of taking—Ram Lal v Kanai Lal 12 Cal 663 Tribbut and it Gangadas 18 Bom 7 (12) Bhagabath v Kalicharan 32 Cal 992 affirmed, 8 Cal 468 (PC) Ranganadha v Bhagtrath: 29 Mad 412 Advocate General Karmalı 29 Bom 133 Bishen Chand v Asmaida 6 All 560 (PC) Still Ch V Kasi Chetty 38 LW 860 AIR 1933 Mad 885 (887) This is now express laid down in sec 115 as amended in 1929

In dealing with a gift to a class you inquire first at what period the class is to be ascertained it may in the case of a will be on the death of the test of at a later period. If the class is to be ascertained on the death of the test of no question of remoteness can arise and the general rule is that the gift did not a class of the class as are then capable of taking. If the effect in favour of such of the class as are then capable of taking. If the ascertainment of the class is deferred to a later date [See Exerction] those subject to any question of remoteness those who are thus capable of taking in either case if any members of the class are incapable of taking because in either case if any members of the class are incapable of taking because in the case if any members of the class are incapable of taking because in the case in the side of the present soft and the rest take the value and that is so even if the gift be to persons born and to be born. Wilson J in Ramidal v Annaidal 12 Cal 663 (673) Bhagabali v Kaliekare.

Child in the nomb—In gifts to children as a class a child en tenlit is at its included. See Okhoymoney v Nilmoney 15 Cal 282 In it il ilmers from [1903] 2 Ch 411 But where the testator bequeathed some property in from

is grandnephews born before the date of this my will it was held that a diephew who was only en tentre sa mere at that time was not entitled to bequest—Re Salaman [1908] I Ch 4

123 Exception -The Exception deals with the construction and ation of a gift to a class some of whom come into existence between the death ne testator and the time when the gift takes effect-Alangamonjors v Sona 8 Cal 157 (162) When a gift is postponed by reason of a prior bequest persons who are members of the class at the time the instrument comes into ration (ie at the testator's death) and also those who become members of efore the period of distribution belong to the class in whose favour the gift ues-Andreus v Partington 3 Bro C C 401 The rule is that children after the testator's death may be entitled under a bequest to children in ass, in cases where the division of the fund among the legatees is deferred I a particular period which takes place after his decease-Oppenheim v 10 Hare 441 Thus where legacies are given to the children of A when hild or children attain a particular age any child who falls under the cription at the time when the fund is to be divided is entitled to a share sough not born till after the testator's death-Gilmore v Severn I Bro C C Hughes v Hughes 14 Ves 256 Curtes v Curtes 6 Maddock 14 So where

Hughes v Hughes 14 Ves 256 Curtis v Curtis 6 Maddoch 14 So where estator gave his residuary estate to trustees upon trust to divide the same ong the children of the testators brothers A and B the share of each son to paid to him upon his attaining the age of 21 years and the share of each sighter to be paid to her on her attaining that age or previously marrying and er the death of the testator but before the period of distribution a son was me to B it was held that the after born son of B was entitled to a portion as to the members of the class—Mass+k v Ferguson 4 Cal 670

But this Exception is not applicable to the wills of Hindus in respect persons who are not born till after the death of the testator because the will of such application would be to contravene the cardinal principle of Hindu w that a Hindu cannot make a bequest in favour of a person who is not in stence at the time of his death CI Alongomonyori v Sonamoni 8 Cal 537 d Cally Nath v Chunder Nath 8 Cal 387 cited in Note 124 under see 112

But the Exception will apply to Hindus where a legatee was alive at the te of the testators death but thed between that date and the period of stribution leaving an heir

The Exception contemplates cases where passession only is deferred and not set of deferred issuing. In other words, the vesting of the property is not stiponed till the date when the right to possession acrities. The vesting takes are immediately on the testator's death despite the fact that possession is stoponed till the period of distribution. Thus is evident from the language of c. 106 also—Stree Chand v. Kass Chetty. 38 L.W. 860. A I R. 1933. Mad. 855. 877. The provision in the Exception that the property will go to the representatives of the person who may have died between the date of the testator's eath and the period of distributions shows that such person takes a vested iterest and the class to whom the bequest is made is thus hable to enlargement. Peach a Prayad v. Ronimom. 18 Cal. 188 (200). affirmed Ranimom v. Radha Prayad v. Ronimom. 18 Cal. 188 (200). affirmed Ranimom v. Radha Prayad v. Ronimom.

But no child born ofter the period of distribution has any claim even there the legacy is given to the children born or to be born —Andreus v fartington 3 Bro C C 402 Whitbread v St John 10 Ves. 152 Re Deloute 1919) 1 Ch 209 Re Paul [1920] 1 Ch 99

# CHAPTER VI

# OF VOID BEOUESTS

Section 99 Act X of 1865

112

Bequest to person by particular description who is not in existence at te tator s death

Where a beguest is made to a person by a particular description, and there is " person in existence at the testators death who answers the description, it bequest is void

Exception -If property is bequeathed to a perdescribed as standing in a particular degree of kindred to specified individual, but his possession of it is deferred unit a time later than the death of the testator, by reason of prior bequest or otherwise, and if a person answering the description is alive at the death of the testator, or curre into existence between that event and such later time, it property shall, at such later time, go to that person, or, if it is dead, to his representatives

### Iliustrations

(1) A bequitable 1000 rupees to the eldest on of B At the darb of a control B has no son. The bequest is tood (ii) A bequeaths 1000 rupees to B for the and after his doub is U eldest son of C. At the death of the testator C had no son. Alterwards, and the title of B as no is born to the life of B as no is born of the thing of B as no is born of the life of B as no is born of the life of B as no is born of C had no son. Alterwards, and the life of B as no is born of C had no son. Alterwards have been determined by the life of B as no is born to C had no son. Alterwards have been death of the testator C had no son. Alterwards have been death of the testator C had no son. Alterwards have been death of the testator C had no son. Alterwards have been death of the testator C had no son. Alterwards have been death of the testator C had no son. Alterwards have been death of the testator C had no son. Alterwards have been death of the testator C had no son. Alterwards have been death of the testator C had no son. Alterwards have been death of the had not been death of the had legacy goes to the representatives of D

(10) A bequeaths his estate of Green Acre to B for life and at his do to the eldest son of C. Up to the death of B. C has had no son. The box to Cs eldest son is void.

(t) A bequeaths 1 000 rupees to the eldest son of C to be paid to the death of R. after the death of B At the death of the testator C has no son but a afterwards born to fun during the life of B and is alive at Bs death Civil is entitled to the 1000 Primer in is entitled to the 1 000 Rupees.

Note —This section applies to Hindus Buddhists are see see and Sch III For construction of this section see Sch III para >

Scope of section — This section is subjected to the restricted 1 in Sch III which says Nothing herein contained shall authorise a least to b quarth process. to b queath prop ny which he could not have alienated inter tites. In words this section words this section is an embodiment of the cardinal rule governing limits that a person capable of taking under a will must be such a person at the take the gift inter error and must therefore either in fact or in concernation of law be in existence at the death of the testator. Therefore a because layour of a person who is not in existence at the time of the testator bond. toid—Valshatramali v Brojasundar 12 Pat 708 146 IC box LIR 19416 61" (619) 6 flowing Dines Chandra v Brog Kamini 39 Cal 87 to CN

This general rule is relaxed by Exception which admits a kinded to the shade of the search of the se a ter the death of the testator and before the period of distribution fed bace than on, he was to be a have than onall not to be affled to the will of Hindus because the fall it would be to subvert the fundamental principle of Hindu law that a Hindu cannot make a bequest to a person not in existence at his death—Cally Nath v Chinader Nath 8 Cal 378 (388), Nafar Chandra v Ratamnala 15 C W N 66 (70) 7 I C 921 13 C L J 85 The Exception must be read subject to the rule of Hindu law (as laid down in the Tagore case) that a bequest to a person not born at the time of the testators death is void Therefore a person not born at the date of the testators death but born between that date and the date of distribution, cannot take under the will See Alangamonjori v Sonamoni 8 Cal 637 (639 640) reversing Alangamonjori v Sonamoni 8 Cal 157

Thus where a Hindu testator gave his property to his grandsons subject to certain trusts held that grandsons born after the death of the testator though during the continuance of the trusts were not entitled to anything under the will-Cally Nath v Chunder Nath 8 Cal 378 (388) Where a Hindu testator devised his property to two females for their lives and on the death of the survivor to the male issue of his brother and the brother had no male issue at the time of the death of the testator held that the gift to the male issue was void-Jovetbas v Kablibas 16 Bom 492 But where a Hindu testator by his will bequeathed portions of property to the wives of his two unmarried sons and the sons subsequently to the testator's death married two persons who had been born before the testator's death held that the gift was valid according to the Exception to this section because the persons answering the description had been alive at the death of the testator and their relationship with the testator's sons came into existence between the date of the testator's death and the time of dis tribution-Dines v Birar Kamini 39 Cal 87 15 CWN 945 (949 952) 11 I C 67 Najar Chandra v Ratnamala 15 CWN 66 (71) 7 IC 921 13 CLJ 85 So also a bequest made by a person to his relative's would be wife who was in existence at the time of the testator's death is valid-Ramdulars v Bishweshwar 18 NLR 143 AIR 1923 Nag 105 (106) 69 IC 876

The word kindred in the Exception should not be interpreted in the restricted sense of the English law as defined in sec 20 (now 24) of this Act which has not been incorporated into the Hindu Wills Act and should not be limited to blood relations when applied to Hindus b.t would include relationship by marriage. Therefore a bequest made by a father to the would be wife of his son may be derined a bequest to a person described as standing in a particular degree of kindred to his .on—Direct v Biraj Kamusi 39 Cal 87 15 CWN 945 (850 982) 11 IC 67

113 Where a bequest is ma

Bequest to person not

in existence at testator's death subject to prior

Where a bequest is made to a person not in cystence at the time of the testator's death,
testator's subject to a prior bequest contained in
the will, the later bequest shall be void,
unless it comprises the whole of the

remaining interest of the testator in the thing bequeathed

### Illustrations

(i) Property is bequeathed to A for his life and after his death to his eldest son for hie and after the death of the latter to his eldest son. At the time of the testator's death A has no son. Here the hequest is a bequest to a person not in existence at the testator's death I is not a bequest of the whole interest that remains to the testator. The bequest to A's eldest son for his hie is your

bequest

THE PERSON NAMED IN

(11) A fund is bequeathed to A for his life and after his death to be deathers. A survives the testator A has daughters some of whom were at in existence at the testator's death. The bequest to As daughters compare the whole interest that remains to the testator in the thing bequeathed. It

bequest to As daughters is valid

(iii) A fund is bequeathed to A for hie and after his death to be daughters with a direction that if any of them marines under the age of equent her portion shall be settled so that it may belong to herself for hie and my be divisible among her children after her death. A has no daughters but at the time of the testator's death but has daughters born afterwards by survive him. Here the direction for a settlement has the effect in the cash daughter who marines under eighteen of substituting for the above to a person not in custance at the time of the testator's death of sentled which is less than the whole interest that remains to the testator and the testator and the day of the content of the day of the content of the day of the content of the day of the day

(10) A bequeaths a sum of money to B for life and directs that upon the death of B the fund shall be settled upon his daughters so that the protein death of B the fund shall be settled upon his daughters so that the protein death of B the fund shall be settled upon his daughter so the divided among the children after her death B has no daughter living at the time of the redeath. In this case the only bequest to the daughters of B is contained in the direction to settle the fund and this direction amounts to a bequest in the state of the redeath and the direction amounts to a bequest mind a less than the whole interest in the fund that is to say of something which is less than the whole interest that remains to the testator in the timp bequested.

Note —This section may be compared with sec 13 of the Transfer of

It applies to Hindus Buddhists etc see Sec 57 and Sch III For cd struction of this section see Sch III para 5

125 The law of gifts and of wills is the same under the Hindu law will in order that there may be a valid gift the donor must immediately did himself of the property in favour of some existing beneficiary and in the saf way with regard to wills there cannot be a gift to a person to come into opening at a future date unless there be a gift to a beneficiary in the intermal-final Lal v Surmomen; 125 Cal 662 (691)

A child en ventre sa mere is considered to be in existence—In 18 II artis Trusts [1903] 2 Ch 411 Long v Blackall (1797) 7 TR 100 4 RR 13

A testator bequeathed his property to his sons for his and further during the share of each and it is a sons for his and further during the share of each and it is a son to be shared as that the share of each son if he left a son or usue of such son living at the dail of the last surprise of the las of the last survivor of the testators one is to be held for the sons of such and the sons of such survivor of the testators one is to be held for the sons of such and the sons of such survivor. and the issue of his predeceased one per starpes for their lives and if the set of the testator left no such son or i.sue then for his widow and daughter set the issue of predeceased. the issue of predeceased daughters. Held that as the title of the cons of the testator was only for the constant. testator was only for the r lives and the bequest to the unborn beneficiants to not in all possible metabolic and the bequest to the unborn beneficiants. not in all possible instances dispose of the subject matter to which they apple and so failed to conserve the subject matter to which they apple and so failed to conserve the subject matter to which they apple and so failed to conserve the subject matter to which they apple to the subject matter to which they are the subject matter to and so failed to comprise the whole of the remaining interest of the tradathese bequests were inoperative masmuch as they contravened the profised of this section—Publisher C. of this section—Pullibar v Sorabji 25 Bom LR 1099 (P.C.) 28 GWN of AIR 1923 PC 123 (CONT.) AIR 1923 PC 122 (126) A testator made a gult of his properties for sons without power of sons without power of transfer and upon his son death life interests act created in favour of son son who were alive at the time of making the bords and upon the conclusion of the life-estates other life-estates were to and favour of erands on the favour of grand-ons who were not in existence Held that the will so far at a created life estates in favour of the created in existence and the creates in favour of the creates were to be a created in the creates were the creates were to be a created in the creates were the creates created life estates in favour of the ons was good so also in so far a it of the life c tates in favour of grandsons who were in existence at the time of the testators death the disposition was also good but those provisions

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THE INDIAN SUCCESSION ACT SEC. 114 ]

purported to create-nertale of uccess on and life estates in layour of transform unborn at the limit of the 16-talors death were void—Debi Prasad v Krishna

AIR. 1928 Oudh 26 (27) 4 OWN 1041 104 IC 847

114 No bequest is valid whereby the vesting of the section 101, thing bequeathed may be delayed Ass. Rule against perpe- beyond the lifetime of one or more persons living at the testator's death and the minority of some person who shall be in existence at

the expiration of that period, and to whom, if he attains

# full age, the thing bequeathed is to belong Illustrations

(i) A fund is bequeathed to Λ for his hie and after his death to B for his and after B's death to such of the sons of B as shall first attain the age of 25 A and B surnive the testator. Here the son of B who shall first attain the age of 25 may be a son born after the death of the testator such son may not attain 25 until more than 18 years have elapsed from the death of the longer liver of A and B and the vesting of the fund any titus be delayed beyond the litetume of A and B and the minority of the sons of B. The bequest.

of sond the inferime of A and B and the inmoving of the sous of B. The Dequestative B's death is void.

(ii) A fund is bequeathed to A for his life and after his death to B for his life, and after B's death to such of B's sons as shall first attain the age of 25 B does in the lifetime of the testator leaving one or more sons. In this case the sons of B are persons hung at the time of the testators decease and the time when either of them will attain 25 necessarily falls within his own lifetime. The bequest is which death of B for the life and there have the solutions are the solutions.

(iii) A fund is bequeathed to A for his life and after his death to B for his hie with a direction that after Bs death it shall be divided amongst such of Bs children as shall attain the age of 18 but that if no child of B shall attain that age the fund shall go to C. Here the time for the division of the fund must arrive at the latest at the expansion of 18 years from the death of B a person inving at the testators decease. All the bequests are valid

B a person hving at the testators decease. All the bequests are valid (11) A fund is bequeathed to trustees for the benefit of the testator's daughters with a direction that if any of them marry under age her share of the fund shall be settled so as to devolve after her death upon such of her children as shall attain the age of 18. Any daughter of the testator to whom the direction applies must be in existence all his decease and any portion of the fund which may eventually be settled as directed must vest not later than 18 years from the death of the daughters whose share it was All these provisions. are valid

Note -This section applies to Hindus Buddhists etc. see Sec. 57 and Sch III For construction of this section see Sch III para 5

Compare this section with Sec 14 Transfer of Property Act

126 Principle and scope of section -It is the policy of the law to discountenance the creation of perpetuities. Property cannot be tied up longer than for a life in being and twenty one years (in England) after This is called the rule against perpetuities-per Jessel MR in In re Ridley (1879) 11 Ch D 645 This rule is one of public policy-In re Oliver's Settlements [1905] 1 Ch 191 The necessity of imposing some restraint on the power of postponing the acquisition of the absolute interest in or dominion over property will be obvious if we consider for a moment what would be the state of a community in which a considerable portion of the land and capital was locked up The free and active circulation of property which is one of the springs as well as the consequences of commerce would be obstructed the capital of the country withdrawn from trade, and the incentives to exertion in every branch

of industry diminished. Indeed such a state of things would be utterly interestent with national prosperity and those restrictions which were intended by the donors to guard the objects of their bounty against the effects of theroa improvidence or originated in more exceptional motives would be based in all --Jarman on Wills (4th Edn.) pp 250 251

This section applies to charitable beguests. The English law as right perpetuity which make an exception in favour of charities ought not to k applied in India. If the Legislature had intended to except bequests to danher from the operation of this section nothing would have been easier than to all a proviso to this section making an exception in favour of charitable beguest — Jones v Administrator General 46 Cal. 485 (511) 47 IC 383 (revision decision of Chaudhur J to the contrary in Ibid at p. 491)

The rule against perpetuity relates to any property whatever be its name and whether it is moveable or immoveable—Couasis v Rustomii 20 Bom 51 (561)

- English and Indian rules compared According to the English law the vesting of property might be postponed for any number of his in being and an additional term of 21 years afterwards and for as many mental in addition as are equal to the ordinary period of gestation should gatalog exist (Jee v Audley 1 Cox 324) and the additional term of 21 years might independent or not of the minority of any person to be entitled (18 integral of the fact whether such person is a minor or not) Indian law horses and the vesting to be delayed beyond the lifetime of persons in being for the good only of the manufacture. only of the minority of some person born in their lifetime the addition of a absolute period of 21 years has not been adopted by this section So where under the English law the additional period allowed after lives in bing #1 term of twenty one years in gross without reference to the mancy of sty person to udon the Indian Statute the term is the period of muonity of person to udon the indian statute the term is the period of muonity at 2 person to whom if he attains full age the thing bequeathed is to belorg the if he has a guardan appointed by the Court at 18 in other cases—Making additions of an of Paris III. padhyaya's Law of Perbetuities p 99
- 1.8 Cases —Where a testator directed that his estate should runs intact and provided for certain religious ceremonies from the profits and direct that his heirs sons sons great grandsons and so on should be enjuthed to enjoy the profits held that the beque t was void because the intention at create a perpetuity and to limit for an indefinite period the enjoying of the profits—Shookmoy v Monoharri 11 Cal 684 (682) (PC) A will profit of the state of the property to my son M for life and I give the property his death to his sons in equal shares. In case he leaves no son behind him, muchitears shall get a son adopted by his wife and thus perpetualte his namely and they shall give the property to him on his attaining the age of 21 yea. And they shall give the property to him on his attaining the age of 21 yea. Held that the bequest in favour of the adopted son who might be adopted any time after the date of M is death was void under this section—heathwalf to chimany 30 Bom 477.

daughters directed that after the death of my daughters, my grands of grandsons whoever among them may be alive shall possess my properties to death of my grandsons my properties where the death of my grandsons all my properties will go to my fathers family it death of my grandsons all my properties will go to my fathers family it my brother R and my nephew H. At the date of his death he had have grandson N and no other grandson was born during the lives of his will and daughters. Held that although N was not mentioned in the will thee we

a valid bequest in his favour of a life estate and a valid remainder in favour of R and H and the bequest did not offend the rule against perpetuity-Dakshayans Amrita Lal 23 CWN 826 53 IC 779

This section invalidates any disposition by which the vesting may be delayed beyond the lifetime of a person living at the testator's death and the minority of some person who shall be in existence at the expiration of that period. The word may shows that this section applies not only where the delay has actually happened but also where it is possible that the delay may happen-Soundara Rajan v Natarajan 44 Mad 446 (462 463)

If there is a bequest to a class and gift to some of the members of the class fails by reason of the rule against perpetuity the whole bequest is not thereby rendered void but it is inoperative only as regards those members See Note 130 under sec 115 as now amended. The Privy Council ruling in Soundara Rajan v. Natarajan 48 Mad. 906 is no longer good law

If a bequest is made to a class of persons with Section 102 regard to some of whom it is inopera- Act X of Bequest to a class some tive by reason of the provisions of secof whom may come under rules in sections 113 and tion 113 or section 114, such bequest 114

shall be void in regard to those persons only and not in regard to the whole class

#### Illustrations

(i) A fund is bequeathed to A for life and after his death to all his children who shall attain the age of 25. A survives the testator and has some children living at the testators death. Each child of A sirving at the testators death must attain the age of 25 (if at all) within the limits allowed for a bequest. But A may have children after the testators decase some of whom may not attain the age of 25 until more than 18 years have elapsed after the decease of A. The bequest to As children therefore is inoperative as to any child born after the testators death and in regard to those who do not altern the age of 25 within 18 years after A death, but is operative.

consider As a death but is operative in regard to the other children of A of D on A on A other children of A of D on and  $\overline{D}$  by name does not prevent the bequest from being regarded as a bequest to a class it is not wholly void It is operative as regards any of the children B C or D who altains the age of 25 within 18 years after As death

Note -This section applies to Hindus Buddhists etc. see Sec. 57 and Sch III For construction of this section see Sch III para 5

Compare this section with sec 15 Transfer of Property Act.

129 Old section -This section has been amended by sec 14 of the Transfer of Property Amendment Supplementary Act XXI of 1929 Before this amendment the section was worded as follows -

If a bequest is made to a class of persons with regard to some of whom it is inoperative by reason of the provisions of section 113

or section 114 such bequest shall be wholly void

Thus this section before it was amended in 1929 was based on the principle of English law that if on the ground of remoteness the testator's intention was prevented from operating in favour of some members of a class it would fail as regards the whole class no effect could be given to the will since it could not be known in what manner he would have desired the individuals of the class to be benefited See Leale v Robinson 2 Mer 363 Pearls v Mosky 11 Ch D 5.5 5 App Cas 711 Dungannon , Smith 12 Cl & Fin. 346

Principle of old section not applicable to Hindus -The principle of the section to that a gift which failed as regards some members of class failed as regards the whole class was not applicable to Hindus Suda 1 rule may be applicable to Lugland a country in which the nearest related are separate in property in residence and in all the details of life and ox brother is no more affected by a gift to another brother than by a gift to stranger and there is all the difference in the world between a gift to all it members of a class and a gift to some of them But with Hindus, the part family state is the normal state separate property is the exception. End where individual members of a family have separate property they may adgenerally do continue to live together joint in food and worship and joint it to their inherited property To such a people the principle laid down in the section (old) ought not to be applied—Ramial \ Kanailal 12 Cal 603 (83) In the case of Hindus therefore when a gift is made to a class of Price consisting of children or descendants some of whom cannot take the table may be considered to have a primary and a econdary intention. His primary intention is that all members of the class shall take and his secondary intention is that if all cannot take those who can shall do so the true rule being in those members of the class take who are at the testators death capable tolking. When taking Where it appeared from the whole of a will executed by a restator than the testator that his primary intention was that all his nephews then born of those who might be born afterwards should take equally under a bequest not be home and his control of the born afterwards should take equally under a bequest not him and his control of the born after the born after the born after the born and his control of the born after the born after the born after the born after the born and his control of the born after the b by him and his secondary intention was that his nephews who were in existent should take though not specifically named and where the primary integral could not be given effect to because the bequest was bad in respect of the who might be born subsequently the Court would carry out the intention and give effect to the bequest as regards the nephews who set competent to take—Bhagabati , Kalicharan 32 Cal 992 (1010) (FB) (b) lowing In the Column of Characteristics of the Characteristic lowing In re Coleman 4 Ch D 165) affirmed by the Privy Council in 8 Ch (PC) Romand 1 Ch D 165) affirmed by the Privy Council in 8 Ch (PC) Romand 1 Ch (PC) Roma 468 (PC) Ranganadha v Bhagarathi 29 Mad 412 Rai Bishen Chaft I Asmaida 6 All 560 (PC) Khimpi v Morarji 22 Bom. 533 (55 58) Mangaldas v Tribhuvandas 16 Bom 652 Manjamma v Padmanabha)<sup>18</sup> Mad 393 (404) Mad 393 (404) Advocate General v Karmalt 29 Bom 133 In such about the uniformal vision and the second second vision and the second vision and the second vision and the second vision and v it must be inferred that the testator meant that those who could take defined to so rather than that v Tribhut andas 15 Bom 652 As a general rule where there 18 a gft w class some of whom are or may be incapacitated from taking because not be at the date of the offer a second to the offer as the date of the offer as the second to the second to the offer as the second to the se at the date of the gult or of the death of the testator as the case may be, where there is no other of the death of the testator as the case may be. where there is no other objection to the gift it should enure for the best of those members of the above. of those members of the class who are capable of taking—Ram Lal \(\frac{1}{2}\) Ana \(\frac{1}{2}\). 12 Cal 663

This principle of Hindu law is now embodied in the new section

New section—Reason of Amendment —The Special Cor mittee observe -

Sec 102 (now 115) of the Indian Succession Act was enacted on the liple of a decision in Table 1 principle of a decision in Leake v Robinson (1817) 2 Mer 363 This series enacts that if a bennest in and enacts that if a bequest is made to a class of persons with regard to some whom it is monorative.

(1) by reason of the rule contained in sec 113 as where a limit

2 115 }

(2) by reason of the rule contained in sec. 115 being the rule against perpetuity

ch bequest shall be wholly word

Prior to certain special Acts [Hindu Disposition of Property Act XV of 16 Hindu Transfers and Bequests (Madras) Act I of 1914; Hindu Transfers d Bequests (City of Madras) Act VIII of 1921] Hindu law did not permit gift in favour of a person who was not in existence at the date of the gift a bequest in favour of a person who was not in existence at the death of ie testator (Tagore v Tagore 1872 9 BLR 377 at pp 397 400) on the ound that a person capable of taking must be in existence at the material tic Difficulties, however arose where a gift was made to a class of persons whom some were and some were not in existence at the date of the mit. he leading case on the subject is that of Ras Bishen Chand v Ismaida (1884) I I A. 164, 6 All 560 wherein a Hindu made a gift of his property to his randson S who has then in existence and to Ss brothers who may be born nereafter. It was argued on the strength of the rule in Leake v. Robinson nd the analogy of sec 102 (now 115) of the Indian Succession Act that as he gift to the unborn grandsons was invalid according to the Hindu law no enclit could be taken even by the grandson who was in existence at the date f the gift. But this contention was overruled by the Judicial Committee. As o sec. 102 it was observed that it did not apply to the facts of the case ecause the gift to the unborn grandson did not fail by reason of the rules ontained in sec. 100 or sec. 101 but by reason of the personal incapacity of the nborn grandsons to take

The rule in Leake v Robusson was applied by the High Court of Calcutta in several cases, cg 8 B L R. 400 2 Cal 262 4 Cal 455 but the tude turned lifter the decision of the Judicial Committee in Ran Bishen Chand v Assmald and the principle of this decision has been followed in a large number of cases in India

The true acope of the rule in Leake v Robinson was pointed out by Sir Lawrence Jenkins in Radha Passod v Raminson is SCal 183 affirmed in 41 IA. 176 41 Cal 1007 Dealing with that rule the learned Judge said at page 199 On behalf of Raminson it is contended that as some of the class cannot take the whole gift is void and in support of this Leake v Robinson has been cited. But this contention proceeds on a misapplication of the case and a misconception of the true nature of a gift to a class. In Leake v Robinson the gift to the class falled because the class could not be ascertained within the period allowed by the rule against perpetuity. The gift herein nowhere offends that rule its only fault is that the class of legatees includes some who were not in existence at the date of the testators death and were thus under a personal incapacity.

The whole question of gifts to a class was gone into at considerable length by Wilson J in Rom I al Sett v hanns Lal Sett (1886) 12 Cal 663. In that case the learned Judge stated that he should be prepared to hold as the general rule that where there is a gift to a class some of whom are or may be incapacitated from taking because not borm at the date of gift or death of the testator as the case may be and where there is no other objection to the gift it should enure for the benefit of those members of the class who are capable of taking

The rule that a Hind  $\alpha$  could not dispose of his property by gift or sale in favour of an unborn person fettered the free disposition of property. To

remove this disability three Acts were passed namely (1) Madras Act, I of 1914 (2) the Hindu Disposition of Property Act XV of 1916 and (3) Madra Act VIII of 1921

It is declared by all the three Acts that a transfer inter invos or disposace by will of any property shall not be invalid by reason only that the transfer or legatee is an unborn person at the date of the transfer or the death of it testator as the case may be. Since gifts and bequests to unborn person at declared to be valid it became necessary to fix a limit of time within which it gift or bequest should vest. This was effected by applying to such gift bequests the provisions of sec. 14 of the Transfer of Property Act and sec. 10 of the Indian Succession Act 1865. All the three Acts left sec. 15 of the T? Act and sec. 102 of the Indian Succession Act servely alone.

One important consequence of the above Acts must be noted here Par to the passing of the three Acts if a bequest was made by a Hindu in faith say of his daughter for her life and after her death to such of her children who shall attain the age of 21 years and some of the children were born belt and others after the death of the testator the bequest though it failed as it those that were not in existence at the death of the testator did not fall up entirety but enured for the benefit of those who were in existence at the of the testator The reason was that in such a case the bequest to the persons failed not by reason of the rule against perpetuity contained in st. il of the Succession Act but by reason of their personal incapacity to take But by the box the bar of personal incapacity was removed by the three Acts with the number of personal incapacity was removed by the three Acts with the number of the num that a bequest to the unborn children in the case put above would now haif reason of the rule against perpetuities contained in sec 101 the gift ben begin to the rule against perpetuities contained in sec 101 the gift ben benefit to the rule against perpetuities contained in sec 101 the gift benefit bene such children who shall attain the age of 21 years and the gift would be fore fail in regard to the whole class Before the passing of the three links unborn person could not take at all and there would therefore be no are for the operation of the rule against perpetuities. Since the enactment of the three Acts an unborn person can take but if he is to take on his attained age of 21 second by the se age of 21 years the bequest offends the rule against perpetuities and it thereing fails by reason of the rule contained in sec 101 with the result that sec 1 and the result that applies and renders the bequest void in regard to the whole class. and is a in fact, what become in fact what happen in Soundara Rajan v Natarajan (1920) 52 14 0 48 Mad 906 (PC) Thus while before the three Acts were passed a bot of to a class of received. to a class of persons some or whom were not in existence at the death of the testator did not find a constant of the death testator did not fail in regard to the whole class these Acts have brought ab a result which was hardly contemplated when the Acts were passed.

In view of what is stated above it is proposed to alter sec. 115 of 12 Indian Succession Act 1925 as follors —

If a beque t is made to a class of persons with regard to some of the it is inoperative by reason of the provi ions of sec 113 or sec 114 such between the second of the regard to those persons only and not in regard to the whole the (Gazette of India 1829 Part V pp 4749)

This Amendment overrules the decisions in Soundara Rajan Val's 48 Mad 960 (PC) 49 MLJ 836 ATR 1925 PC 244 93 IC 289, Special Society of the Allender of Administrator Guitted 90 Sitesankara v. Subramania 31 Mad 517 Subramania 1 Mary 12 232 (PC) 17 CW 488 In these cases it was held that when a lower tempers of a class was void as offending the rule again t perpose the bequest failed a regards that whole class.

116 Where by reason of any of the rules contained in Section 103

Bequest to take effect on during of prior bequest in favour of a person or of a class of 1865

Act X of favour of a person or of a class of 1865

iscluse of pror bequest favour of a person or of a class of persons is roud in regard to such person or the result of each class on the person of the person

or the whole of such class, any bequest contained in the same will and intended to take effect after or upon failure of such prior bequest is also void

#### Illustrations

(i) A fund is bequeathed to A for his life and after his death to such of his sons as shall first attain the age of 25 for his life and after the decease of such son to B A and B survive the testator. The bequest to B is intended to take effect after the bequest to such of the sons of A as shall first attain the age of 25 which bequest is void under section 114. The bequest to B is void under section 114 The bequest to B is void under shall first attain the age of 25 and if no son of a shall aftain that age to B A and B survive the testator. The bequest to B is intended to take effect upon failure of the bequest to such of As sons as shall dirst attain the age of 25 which bequest is void under section 114. The bequest to B is void.

Note —This section applies to Hindus Buddhists etc. see Sec. 57 and Sch. III. For construction of this section see Sch. III. para 5

This section has been amended by sec 14 of the Transfer of Property Amendment (Supplementary) Act XXI of 1929 This is consequential to the amendment of sec 115 This section may be compared with se. 16 Transfer of Property Act

131 Principle —The rule in this section is substantially in consonance with the English law according to which limitations under void limitations are themselves void. In English law where a devise is void for remoteness all limitations ulterior or expectant on such remote devise are also void. Jarman on Wills 6th Edn. Vol. 1 p. 253. Proctor v. Biskop of Bath. 2 H BI 358

Thus where there was a gift by a will to A for life and after his death to the first son of A for life and to the first son of A s first son and in default of such son to B for life held that as the gift to A s grandson was void the subsequent gift to B failed—Money penny v Dering 2 DeG M and G 145 A Hindu testator bequeathed as follows My great grandsons shall when they attain majority receive the whole to their satisfaction and they will divide and take the same in accordance with the Hindu law God forbid to but should I have no great grandsons in the male line then my daughter soms when they are of age shall take the said property from the trust fund and divide it according to the Hindu Eastras in voque. Held that the bequest to the daughter's soms was dependent on and not alternative to the great grandsons and was therefore void—Bropanath v Anadamansy i 8 BLR 208

Effect of direction for income arising from any property shall Act X of accumulation be accumulated either wholly or in part

during any period longer than a period of eighteen years from the death of the testator such direction shall, save as hereinafter provided, be void to the extent to which the period during which the accumulation is directed exceeds the aforesaid period, and at the end of such period of eighters years the property and the income thereof shall be disposed of as if the period during which the accumulation has best directed to be made had elapsed

(2) This section shall not affect any direction for

accumulation for the purpose of-

(1) the payment of the debts of the testator or and other person taling any interest under the will, or

(11) the provision of portions for children or to moter issue of the testator or of any other person taling any interest under the will, of

(111) the preservation or maintenance of any fre perty bequeathed,

and such direction may be made accordingly

This section has been amended by sec 14 of the Transfer of Property Amendment (Supplementary) Act XI of 1929 The old section stood i follows ---

117 A direction to accumulate the income arising from all property shall be void and the property shall be disposed of as if no accumulation had beat Effect of direction for accumulation

Exception —Where the property is immoveable or where acco mulation is directed to be made from the death of the testalor is direction shall be and a feet of the testalor is direction shall be and a feet on the death of the testalor is direction shall be and the same feet of the testalor is direction. direction shall be valid in respect only of the income arising the property within one year next following the testator's death and the next of the year. at the end of the year such property and income shall be disposed respectively as if the end of the year such property and income shall be disposed. respectively as if the period during which the accumulation has bed directed to be made at 2 1. directed to be made had elapsed

The present section has been amended in the same way as sec 17 (lorners of the Transfor of Decen amended in the same way as sec 17 (lorners of the Transfor of Decen amended in the same way as sec 17 (lorners of the Transfor of Decen amended in the same way as sec 17 (lorners of the Transfor of Decen amended in the same way as sec 17 (lorners of the Transfor of Decen amended in the same way as sec 17 (lorners of the Transfor of Decen amended in the same way as sec 17 (lorners of the Transfor of Decen amended in the same way as sec 17 (lorners of the Transfor of Decen amended in the same way as sec 17 (lorners of the Transfor of Decen amended in the same way as sec 17 (lorners of the Transfor of Decen amended in the same way as sec 17 (lorners of the Transfor of Decen amended in the same way as sec 17 (lorners of the Transfor of Decen amended in the same way as sec 17 (lorners of the Transfor of Decen amended in the same way as sec 17 (lorners of the Transfor of Decen amended in the same way as sec 17 (lorners of the Transfor of Decen amended in the same way as sec 17 (lorners of the Transfor of Decen amended in the same way as sec 17 (lorners of the Transfor of Decen amended in the same way as sec 17 (lorners of the Transfor of Decen amended in the Same way as sec 17 (lorners of the Transfor of the Transfor of the Transfor of Decen amended in the Same way as sec 17 (lorners of the Transfor of the Tra 18) of the Transfer of Property Act Thus section is an entirely new one get has nothing in common at the control of the transfer of the control of the contr has nothing in common with the old

Note —This section applies to Hindus Buddhists etc. see Sec. 27 1011 III (as now amonded) Sch III (as now amended)

132 Amendment — The old section allowed accumulation for a pending per only in certain and pending pendi of one year only in certain cases. In England the Theliusson Act allowed accumulation for a round much longer negred much longer period moreover in certain cases the restriction against accombining was not applicable to a complete the complete to the complete the complete to the complete th tion was not applicable at all. Thus that Act allowed accumulations for payment of debte and for payment of debts and for providing funds for children Accumulations also allowed in Fine-by Lor. also allowed in English Law for maintaining property in good reparties 2 Ch 13 By the Accumulation of the state of the sta 2 Ch 13 By the Accumulation Act 1892 and by the Property Act is some more exceptions are exceptions. some more exceptions were added to the rule enacted in the Thellusson A.

The whole have a new were added to the rule enacted in the Thellusson at the Thell (15 Geo V c 20) Is Indiana secs 164 166 of the Property Art, 152 for 16 Geo V c 20) (15 Geo V c 20) In Irda the decisions show that accumulation, may directed with certain vestories. directed with certain restrictions but they do not lay down any rule about the direction and which Courts or the directions but they do not lay down any rule about the directions but they do not lay down any rule about the direction of the dire is definite and which Courts can casely follow. It is desirable to lay definitely on the lines of the F-air. definitely on the lines of the English law the periods and the objects for six-

aforesaid period, and at the end of such period of eighteen years the property and the income thereof shall be disposed of as if the period during which the accumulation has been directed to be made had elapsed

(2) This section shall not affect any direction for accumulation for the purpose of—

(1) the payment of the debts of the testator or any other person taking any interest under the null or

(u) the provision of portions for cluldren or remoter issue of the testator or of any other person taking any interest under the will, or

(iii) the preservation or maintenance of any property bequeathed,

and such dwection may be made accordingly

This section has been amended by sec 14 of the Transfer of Property Amendment (Supplementary) Act XXI of 1929 The old section stood as

\*117 A direction to accumulate the income arising from my
Effect of direction for
accumulation property shall be void and the property shall
be disposed of as if no accumulation had been
directed

Exception—Where the property is immoveable, or where accumulation is directed to be made from the death of the testator the direction shall be vahid in respect only of the income arising from the property within one year next following the testator's death and at the end of the year such property and income shall be disposed of respectively as if the period during which the accumulation has been directed to be made had elapsed

Then followed five illustrations which have been omitted

The present section has been amended in the same way as sec 17 (formerly 16) of the Transfer of Property Act. This section is an entirely new one and has nothing in common with the old.

Note -- This section applies to Hindus, Buddhists etc. see Sec 57 and Sch. III (as now amended)

132 Amendment — The old section allowed accumulation for a period of one year only in certain cases. In England the Thellusson Act allowed a much longer period mortioner in certain cases the restriction against accumulation was not applicable at all. Thus that Act allowed accumulations for the payment of debts and for providing fund for children Accumulations for the payment of debts and for providing fund for children Accumulations are also allowed in English Law for maintaining property in good repair—[1891] 2 Ch. 13. By the Accumulation Act. 1892 and by the Property Act. 1822 some more exceptions were added to the rule enacted in the Thellusson Act. The whole law is now consolidated in secs. 164 166 of the Property Act. 1925 (13 Geo. V. C. 20). In Irdia the decisions show that accumulations may be directed with certain restrictions, but they do not lay down any rule which is definited and which Courts can easily follow. It is desirable to lay down definitely on the lines of the English law the periods and the objects for which

a condition as to accumulation should be h.ld valid. It is however difficult to adopt the English law contained in the Property Act without affecting the provisions of secs 13 and 14 of the Indiana Succession Act. We therefore consider it desirable to permit accumulations during the following periods only —

- (1) the life of the testator or
- (2) a period of 18 years thereafter
- This would avoid any difficulty of constructions. At the same time we think it desirable to accept certain well recognised exceptions in law such as those relating to provisions for the payment of debts raising portions for children and the repairs to the property—Report of the Select Committee
- 133 Hindu Law ....The old section under which a direction for accuration was pronounced to be invalid did not apply to Hindus because Hindu law favours the doctrine of accumulation of income. The new section which allows such accumulation has been made applicable to Hindus Buddhists etc.

Under the Hindu law a direction in a will to accumulate the income arising from any property is not necessarily void. Such a direction is quite in accord ance with the mode of Hindu life and thought and is not against the policy of Hindu Law-Amrito Lall v Surnomoji 24 Cal 589 Rajendra Lall v Rajecomari 34 Cal 5 Krishnarao v Benabar 20 Born 571 (588) No hard and fast rule can be laid down with regard to the capacity of a Hindu to direct accumulations. In each case the particular direction must be examined to see whether the object desired was illegal or whether the effect of carrying out the direction would be to bring about a state of things inconsistent with Hindu Law or whether the direction to accumulate is so unreasonable in its nature as to be void as against the public policy of the realm. Thus if the object of the direction to accu mulate were to create a perpetuity it would be void if the effect were to make a gift in favour of a donce in future with no gift in praesents the direction to accumulate would be illegal being inconsistent with Hindu Law. But the direction to accumulate the surplus income until it amounts to Rs. 1000 and then spend the proceeds in feeding the poor does not infringe any rule of Hindu Law relating to gift and is valid-Rajendra v Rajecomari 34 Cal 5 (10) See also Secrangathanns v Bara Vaithilanga 40 MLJ 532 AIR 1921 Mad 528 62 I C 104 Thus where a testator directed by his will that the surplus income of his estate after making some monthly payments should be accumulated until the death of his widow upon which event the whole of his estate together with such accumulations should be made over by his trustees to his adopted son on attaining majority if such son should survive his widow and, if not to his daughters and their sons held that such a direction to accumulate was not invalid according to Hindu Lau-Imrito Lal v Surnomove 24 Cal 589 direction to an executor to accumulate the income for the benefit of the future wife of the testator's son if the son married within a fixed period (e.g. 10 years) is not a direction for perpetual accumulation and is therefore valid-Nafar Chandra v Ratanmala 15 C.W N 66 (70) 7 I C. 921 The direction in a will to accumulate the income till the boy to be adopted attained the age of 16 years, wa held not to be a direction to accumulate it forever and could not be treated as infringing the law as to perpetuities-Jamnabas v Dharsey 4 Bom.L.R. 893

But a direct or for "ecumulation for all time or until the rents and profits aggregated to three lacs of rupes or any other certain amount is void, as being a trust for an illegal purpose namely of creating a perpetuity—Arithmatamani v. Innala, 4 B.L.R. OC 231. A trust for the accumulation for 99 years of the surp us income of an estate exposuring the true to continue such trust.

after the expiration of the 99 years term and making no disposition of the beneficial interests in the estate was held void-Kumara Ashima Krishna y Kumara Krishna 2 BLR OC 11 A direction that out of the income of the property six annas should be expended for the maintenance of the family and performance of religious services and the remaining 10 annas should not be expended at all but should accumulate from generation to generation so long as the family remains joint is contrary to Hindu Law-Shookmov v Monoharri 11 Cal 684 (693) (PC)

The present section allows the accumulation to be made only for a period not exceeding 18 years

If there is a present gift of property (se gift to take place immediately on the testator's death) a direction in the will for accumulation of the profits of the estate must be rejected as inconsistent or repugnant-Cally Nath v Chunder Nath 8 Cal 378 (387)

105 1118 No man having a nephew or niece or any nearer

Bequest to religious or charitable uses

relative shall have power to bequeath any property to religious or charitable uses, except by a will executed not less

than twelve months before his death, and deposited within six months from its execution in some place provided by law for the custody of the wills of living persons.

### Illustrations

A having a nephew makes a bequest by a will not executed and deposited as required-

for the relief of poor people

for the maintenance of sick soldiers

for the erection or support of a hospital for the education and preferment of orphans

for the support of scholars

for the erection or support of a school

for the building and repairs of a bridge for the making of roads

for the erection or support of a church for the repairs of a church

for the benefit of ministers of a religion

for the formation or support of a public garden All these bequests are void

Note ....This section does not apply to Hindus Buddhists etc see sec 57

134 Scope of section ... The words in the Indian Succession Act expressing relationship denote only legitimate relationship. They cover such relationship as originates from lawful wedlock. A testator having a bastard nephew can dispose of his property for chantable purposes and such nephew cannot take objection under this section-Smith v Massey 30 Bom 500

The word relation in this section refers to kindred only as set forth in the table of consangumity (Schedule I) and has no application to relationship by marriage (e.g. wife) So where a testator died two days after bequeathing certain property to charitable uses, and left a widow surviving him held that the bequest was not invalid by reason of the existence of the widow-Adminis trator General v Simbson 26 Mad 532

Where the testator had nearer relatives than nephews and the will was executed less than twelve months before his death a bequest for charitable purposes (e.g. for the support of the testator's Temperance and Reading Rooms or European personers and Poor Widows Quarters attached thereto) was void under this section—4dministrator General v Money 15 Mad 448 (474) A bequest to a Mission made by a man having an adopted son (who is a nearer relative than a nephew) is invalid if the will though executed more than 12 months before his death was not deposited according to the provisions of this section—Rajamanikam v Farrar 16 LW 455 AIR 1923 Mad 131 (132) 69 IC 954

Bequest for charitable uses ... This section only requires that a will making a bequest for charitable uses should be executed at least 12 months before the testator's death and deposited according to the provisions of this section but it does not require that a codicil should be so executed and deposited. So where a will was executed more than twelve months before the testator's death and deposited according to the provisions of this section but a codicil (which modified the will to some extent) though executed seven months before his death was not deposited according to its provisions and it was contended that in as much as the will must be taken to have been made on the date of the codicil the will and codicil were both inoperative held overruling the contention that it was not correct to say that the codicil did so operate as if the will was made at the date of the codicil that the codicil did not prevent the operation of the will and that both the will and the codicil were operative-Administrator General v Hughes 40 Cal 192 (203 204) 21 I C 183 A charitable gift contained in a will is not invalidated by the fact that the will as confirmed and republished by a codicil made three months before the death of the testator-In to Moore Long v Moore [1907] 1 Ir Rep 315

# CHAPTER VIII

### O1 THE VESTING OF LEGACIES

119 Where by the terms of a bequest the legatee is Section 106

Date of vesting of lenot entitled to immediate possession of Act of

Date of vesting of legacy when payment or possession postponed. It at the proper time shall, unless a

contrary intention appears by the will, become vested in the legatee on the testator's death, and shall pass to the legatee's representatives if he dies before that time and without having received the legacy, and in such cases the legacy is from the testator's death said to be vested in interest

Explanation —An intention that a legacy to any person shall not become vested in interest in him is not to be inferred merely from a provision whereby the payment or possession of the thing bequeathed is postponed, or whereby a prior interest therein is bequeathed to some other person, or whereby the income arising from the fund bequeathed is directed to be accumulated until the time of payment

arrives, or from a provision that, if a particular event shall happen, the legacy shall go over to another person

#### Illustrations

(1) A bequeaths to B 100 rupees to be paid to him at the death of C On As death the legacy becomes vested in interest in B and if he dies before C his representatives are entitled to the legacy

(u) A bequeaths to B 100 rupees to be paid to him upon his attaining the age of 18. On As death the legacy becomes vested in interest in B

(iii) A fund is bequeathed to A for life and after his death to B
 On the testators death the legacy to B becomes vested in interest in B
 (iv) A fund is bequeathed to A until B attains the age of 18 and then to

The legacy to B is vested in interest from the testator's death

(v) A bequeaths the whole of his property to B upon trust to pay certain debts out of the income and then to make over the fund to C. At As death the gift to C becomes vested in interest in him.

(n) A fund is bequeathed to A B and C in equal shares to be paid to them on their attaining the age of 18 respectively with a proviso that if all of them due under the age of 18 the legacy shall devolve upon D On the death of the testator the shares vested in interest in A B and C subject to be divested in case A B and C shall all due under 18 and upon the death of any of them except the last survivor under the age of 18 his vested interest passes so subject to his representantes

Note —This section applies to Hindus Buddhists etc. see sec 57 and Sch III. It may be compared with sec 19. Transfer of Property Act.

135 Vested Interest and Contingent Interest —An interest is to be vested when it is not subject to any condition precedent when it is to take affect on the happening of an event which is certain whereas an estate is contingent when the right to enjoy, ment depends upon the happening of an uncertain event which may or may not happen. A person takes a vested interest in property at the testator's death when he acquires a proprietary right in it at that time but the right of enjoyment is only deferred till a future event happens which is certain to happen but a contingent interest so one in which neither any proprietary interest nor a right of enjoyment is given at the testator's death but both depend upon future uncertain events

Thus a bequest to a person payable or to be paid at or when he shall attain twenty one years of age or at the end of any other certain determinable term confers on him a vested interest immediately on the testator's death as alebitum in transmissible to his executors of administrators for the words payable or to be paid are supposed to dis annex the time from the gift of the legacy so as to leave the gift immediate in the same manner in resp ct of its vesting as if the bequest stood singly and contained no mention of time-Williams on Executors (11th Edn.) Vol. II pp. 973-974 A testator bequeathed to his son £400 to be paid to him at the end of the year next after the testator's death and the further sum of £100 at the death of his mother. The son died before his mother. Held that the son took a vested interest in the £100. The legacy of that sum was plainly vested the time of payment only being postponed-Jackson v Jackson 1 Ves Sen 217 But where an estate is bequeathed to A until he shall marry and after that event to B Bs interest in the bequest is contingent because it depends upon a condition precedent 11 the marriage of A an event which may or may not happen. B has at present no proprietary interest in the estate and he cannot alienate it But as soon as A marries the contingent interest of B becomes a vested interest because of the happening of the event (As marriage) on which it was so long

contingent (see see 120) In a contingent bequest the interest is not complete until the specified event happens or does not happen. In case of a vested interest the interest is complete but on the happening of a specified event it may be divested—Festing v. Allen 5 Hare 573. In the Eddel's Trusts. LR 11 Eq. 559.

The true criterion is the certainty or uncertainty of the event on the happening of which the gift is to take effect. Thus if a bequest is made in favour of one person and after his death the property is directed to go to another the second legatee takes a vested interest in the estate. The death of the prior legatee is not an uncertain contingency. Although the date of the death cannot be known beforehand the event itself is absolutely certain. There fore the interest taken by such a legatee is not a contingent one but he has a vested interest in the property bequeathed to him-Darshan v Wali Khan 1929 ALJ 274 116 IC 30 AIR 1929 All 102 (104) Where the event 19 certain though future and the payment or enjoyment is postponed by reason of prior estates or interests the ulterior interest to take effect after them will be rested. Thus under a gift by a testator to A at the decease of the testators wife As interest vests at the testator's death-Subramaniam v Subramaniam 4 Mad 124 (126) following Blamire v Geldart 16 Ves 314 Jairam v Kuver bha: 9 Bom 491 (510) Where a will provided as follows - When I die my wife named Surai is owner of that property. And my wife has powers to do in the same way as I have absolute powers to do when I am present and in case of my wife a death my daughter Mahalakhsmi is owner of the said property after that death held that the gift over to Mahalakhshmi was not contingent on her surviving Surai but depended upon the death of Surai which was a certain event and that Mahalakhshmi took a vested interest in the property subject to the life interest given to Suray-Lally v Jagmohun 22 Bom 409 (414) Similarly where a will provided as follows - After my death my wife if she be alive is the rightful heir and if she be not alive and after the death of my wife my daughter B-N is my rightful heir As to my daughter B N whom I have after the life time of myself and of my wife appointed heir to my property as to the surplus the hoir to the same is my daughter B N held that B N would take a vested interest which would pass to her heirs on her death-Chunilal v Bas Muls 24 Bom 420 (423) A Hindu made a will to the effect that after the death of his widow a moiety of his property should go to his brother A and on his death to As two sons B and C A died in the life time of the testator's widow and B and C agreed to a complete division of all As property which was held in coparcenary. Later on in the life time of the testator's widow B also died and B s vidow claimed her husband's share it was held that B and C took As mosety under the will as tenants-in common and that each of them had a vested interest in a one fourth share though the actual enjoyment was postponed until the death of the widow-Reuun y Radha 7 WR. 35 (PC) 4 MIA 137

A vested interest is not defeated by the death of the decisee before he obtains possession and his representative will be entitled to its benefit. Thus a person gave a bequest to his neight we to take after the death of himself and his wife. The nephew survived the testator but predeceased the testators wife. Held that the nephew took a vested interest which was transmissible to his heiss-Bilaso v. Minim. Lal. 33. All. 558 (559). 8. A.L.J. 577. (This is nonther point of distinction between a vested interest and a contingent interest). Therefore viere out of two persons in whom an estate vests one person dies the whole property does not pass to the other by survivorship but is divisible between the hiving person and the heir of the deceased-Arishina Alyar v. Suami.

ISEC. 119

nath 8 LW 140 47 IC 723 (724) 1918 MWN 503 Mathuranath v Mon mohini 57 IC 747 (Cal)

A testator devised a house to his vise for life and directed that after her decease his executors should hold the house in trust for his son J for life and in the event of J is death in trust for J is issues and in default of such issues in trust for the testators son h if then living J died unmarried in the lifetime of the testators window and of K. horought a suit claiming the house. The High Court held that h tool a contingent interest because the words if then living meant if living after the death of the testators window and until her death the suit was not maintainable. But the Privy Council reversed this decision holding that the words if then living meant if living at the death of J and hence upon the death of J the house vested absolitely in K subject to the life interest of the testators window—Kankushru v Shrimbai 43 Bom 88 (100 101) (PC) 21 Bom LR 130 23 CW N 419 51 IC 481

The rules of construction for determination of such questions are too well established. If a legatee is not entitled to immediate payment of the thing bequeathed but it is payable to him at some future time or on the happening of a particular event the legacy is vested or contingent depending on the intentions of the testator When the testator intends a present gift but merely postpones enjoyment the interest is vested and if he dies while the time at which it is payable is still in suspense his hears and logal representatives would be entitled to it when the time for payment arrives. But if the legacy is not to yest till the time for payment arrives or in other words the vesting of the legacy is made to depend on the event of the legatee being alive at the time fixed for payment the interest is a contingent interest which is not transmissible to his heirs. Then again there is another form of devise where the testator creates a vested interest taking effect from the moment when the will comes into force but attaches to it a condition of defeasance which makes it hable to be vested on the happening or non-happening of a particular event. Whether the estate is vested contingent or conditional has undoubtedly to be gathered from the whole will but the general policy of law is to favour vesting and unless an opposite intention is expressed or implied from the other provisions of the will the law will construe a grant which is to take effect in future as creating a vested interest in favour of the grantee from the very moment of transfer

Devise without any intimation of desire to postpone operation, if confers immediate vested interest —Where by his will a Hindu testator gave a fife interest in fine state to his wife and proceeded to provide that after the death of his wife his son would be entitled to the ownership and possession in absolute interest and there were further provisions as to where the estate would go in case the son died before the testator or his wife it was held that under the will the estate vested in the son on the death of the testator. Such vesting was not postponed by the words after the death of my wife which merely indicated the termination of the prior life interest nor by the words would become absolutely entitled which merely meant that what would be a remainder during the life time off the widow would become absolute and entire on her death—Size Chamdra v Ant Asskore 42 CWN 805.

136 Vesting cannot be postponed —The fact that the estate granted is subject to partial trusts or charges for partial purposes does not postpone the vesting of the interest. Thus where a testator after directing the payment of some amounties to some persons for their lives gave the whole of his property to his grandsons to be divided among them only after the annuties have ceased on the death of the annutiants held that the fact that the estate

was subject to partial trusts did not postpone the vesting in interest of the gift to the grandsons-Cally Nath , Chunder Nath 8 Cal 378 (388) If a bequest is to a person for life and after his death to his children the bequest becomes vested in each child as and when it is born and the vesting is not postponed till the death of the life-tenant. The expression after his death is taken to indicate merely the time when the gift over becomes reduced to possession and not the time when the right to such possession vests-Adams v Mrs Gra) 48 MLJ 707 90 IC 5 AIR 1925 Mad 599 (602) Halifax V Wilson (1809) 16 Ves. 168 Thus a testator bequeathed a sum of money after the life time of his daughter to such of her sons as shall attain 21 and further directed that if she should die leaving no son living at her death who shall attain 21 so much of the money as shall not have become vested should go to my son A son of the testator's daughter attained the age of 21 but died in her life time. Held that each such son obtained a vested interest, and such interest was not divested by reason of his not surviving her and hence the gift over to the testator's son did not take effect-Adams v Mrs Gray 48 MLJ 707 90 I C 5 A I R 1925 Mad 599 (603) Mailland v Challe (1877) 6 Maddock 243 23 RR 209 So also a bequest in favour of a person simply (i.e. without any intimation of a desire to suspend or postpone its operation) confers a vested interest and the appointment of an executor or a guardian to that person while he is a minor with a direction to make over the property to him on his attaining majority does not postpone the vesting of interest-Harris v Brown 28 Cal 621 (634 635) (PC)

Construction-Intention of testator -The question whether particular words create a vested or a contingent interest is one of construction No particular words are necessary to the vesting of an interest and the words of the grantor must be construed in their plain and ordinary meaning. Words which have become by accepted usage terms of art in England do not exist in the vernaculars of India where the English mode of creating interests is but of recent origin-Harris v Brown 28 Cal 621 (635) (PC) Where the ultimate object of the testator was clearly to male a gift of the property to the donees who were also executors but he directed that sufficient fund from it should be provided during the life time of his wife to pay her a certain sum monthly and charged the property with payment of another sum to his other wife it was held that as the estate was devised to the executors not for but subject to a particular purpose they were not trustees but devisees of an estate subject to a charge. The testator vested the property in the executors but postponed their beneficial interest in it until his younger wife's death-Subramamam v Subraman am 4 Mad 124 (125 126) following King v Denison 1 Ves & B 272

138 Explanation —Postponement of emoyment —An interest may be a sested one though its enjoyment may be postponed. Thus a testator executed his will whereby he gave his property after the death of himself and his wife to his nephew D. D survived the testator. It was held that D took a vested interest in the property although his enjoyment and possession were postponed till the death of the testator's wife—Bilaso v Munn Lal 33 All 558 (559) 8 ALJ 577. Where a will provided that the testator's mother and his wife were to ucceed to his property for hife and on their death his sister's sons should hold the properties in possession and enjoyment by right of inheritance it was held that the nephews were intended to take vested interests on the death of the testator though their possession and enjoyment were postponed—Bhagobativ Nali Chairan 38 Cal 468 (PC). Where a testator bequeathed

his property to two persons for hife and the remainder absolutely in favour of a specified class of persons on the termination of the life estates the property became vested in that class on the death of the testator and the mree fact that they were not entitled to immediate possession did not make it a contingent bequest—Sizee Chand v. has Chetty 38 L.W. 860 A.I.R. 1933 Mad. 785 (880) Mathuranath v. Monmohim 27 I.C. 747 (Cal.)

If the will contains sifficiently clear words giving to the legater an imme date vested interest any direction postponing the enpoyment of the property must be disregarded as repugnant (under sec. 138)—Cally Nath v Chunder Nath 8 Cal 378 (387); Lloyd v Webb 24 Cal 44 (51)—If the legatee is a minor the enjoyment can be postponed only during his minority. Thus where a testator directed that out of the net income of his estate his trustees should expend Re. 500 every year for the maintenance of J (a minor) and that, when J should attain the age of 30 years the trustees should give to J the net residue of his property remaining at that time held that the property vested in J on the testators death that the enjoyment could be postponed only during his minority that the direction for postponement of enjoyment till the age of 30 years must be disregarded and was inoperative after his majority and that the income of the property including all moome which accrued since his majority must be paid to J—Georgia Shingar v. Rivett Carnae 13 Bom. 463 (468 469)

Prior interest giren to some other person —An interest may be vested though the prior interest may be given to some other person. Where the en joyment is postponed by reason of circumstances connected with the estate or for the convenience of the estate as it has been termed for instance where there are prior life estates or other interests the ulterior interest to take effect after them will be vested. Thus under a gift by a testator to A at the decease of the testators wile A is interest vests at the testators death—Blumier & Geldart 16 Ves. J. 314 See also Cally Nath v. Chunder Nath. 8 Cal. 378 (388–392).

Direction for accumulation of income—A gift in terms which import a present vested interest with a postponed time of payment is not made contingent by a direction to accumulate till the time of payment arrives—Blease v. Burgh 2 Beav 226. Where there is a clear gift a direction to accumulate the interest and pay the principal and accumulations at the age of 21 will not affect the vesting and make the gift a contingent one—Stretch v. Wathins 1. Maddock. 233. Breedon v. Tugman 3 M. & K. 289. After the interest has vested the donee is entitled to the income anising therefrom during the period of suspension provided there is no prior interest notwithstanding any direction for postpone ment of enjoyment. Socials v. Ritell Cannee 13 Bom 463 (483) (cited above)

Legacy passing to another person on the happening of a particular event—Where there is a gift to an infant with remainder over in the event of his dying under 21 the infant has a vested interest subject to be divested on his death under that age See Illustration (ii) O Mahoney v Burdett LR 7 HL 388 Massy k Fergusson 4 Cal 304 Saunders v Vaulter 1 Cr & Ph 248 Metry v Hill LR 8 Eg 619

A testator directed his trustees and executors to divide his property among his sons when they should attain the age of 21 and there was also a provision in the will that in the event of any such person dying in the testator's life time or at any time thereafter prior to division leaving lawful issue such issue should take the estate of the deceased parent. One of the legatees who had attained the age of 21 at the testator's death died some months after leaving issue, held that at the testator's death the legacy vested in the legatee, but

became divested by the legatee's death prior to division and that the gift over to the issue of the legatee was not void but took effect-Bachman v Bachman 6 All 583 (595) A will provided that on the death of the testator his wife K would be entitled to hold possession of the moveable and immoveable properties during her life time that on the death of K his nephew R would get all those properties and that if the said R died before the death of K, then of the heirs of R such as wife son grandson daughter or daughter's son whoever would be alive at the time of the death of K would get all the properties to be left by the testator Held that R obtained a vested interest and not a contingent interest. The mere fact that on R's predeceasing h, the estate was to go to his heirs did not raise the inference that the intention was that the legacy to R was not vested in interest-Srish Chandra v Kadambini 44 CLJ 18 97 IC 685 AIR 1926 Cal 1175 (1176)

Date of vesting when legacy contingent upon specified uncertain event

120 (1) A legacy bequeathed in Section 10 case a specified uncertain event shall Act X of happen does not vest until that event happens

- (2) A legacy bequeathed in case a specified uncertain event shall not happen does not vest until the happening of that event becomes impossible
- (3) In either case, until the condition has been fulfilled, the interest of the legatee is called contingent

Exception —Where a fund is bequeathed to any person upon his attaining a particular age, and the will also gives to him absolutely the income to arise from the fund before he reaches that age, or directs the income, or so much of it as may be necessary, to be applied for this benefit, the bequest of the fund is not contingent

#### Illustrations

(s) A legacy is bequealed to D in case A B and C shall all die under the age of 18 D has a contingent interest in the legacy until A B and C all die under 18 or one of them attains that age

die under 18 or one of them attains that age
(n) A sum of money is bequeathed to A
18 or when he shall attain the age of 18 As interest in the legacy is
contingent until the condition is infilled by his attaining that age
(ni) An estate is bequeathed to A for life and after his death to B if B
shall then be living but if B shall not then be living to C A B and C survive
the testator B and C each take a contingent interest in the estate until the
event which is to vest it in one or in the other has happened. B dies in the
lifetime of A and C Pipon the death of B C acquires a vested right to obtain

possession of the estate upon As death

(v) A legacy is bequeathed to A when she shall attain the age of 18 or shall marry under that age with the consent of B with a proviso that if she neither attains 18 nor marnes under that age with Bs consent the legacy shall go to C A and C each take a contingent interest in the legacy A attains the age of 18 A becomes absolutely entitled to the legacy although she may have

married under 18 without the consent of B

(ii) An estate is bequesthed to A until he shall marry and after that event
to B

B interest in the bequest is contingent until the condition is fulfilled by

As marrying

(vii) An estate is bequeathed to A until he shall take advantage of any law for the relief of insolvent debtors and after that event to B Bs interest in

the bequest is contingent until A takes advantage of such a law

(vm) An estate is bequeathed to A if he shall pay 500 rupees to B As interest in the bequest is contingent until he has paid 500 rupees to B (ix) A leaves his farm of Sultanpur Khurd to B if B shall convey his own farm of Sultanpur Buzurg to C Bs interest in the bequest is contingent until he has conveyed the latter farm to C

(z) A fund is bequeathed to A if B shall not marry C within five years after the testator's death. As interest in the legacy is contingent until the condition is fulfilled by the expiration of the five years without Bs having married C or by the occurrence within that period of an event which makes the fulfilment of the condition impossible

(xi) A fund is bequeathed to A if B shall not make any provision for him ill. The legacy is contingent until B s death

(xii) A bequeaths to B 500 rupees a year upon his attaining the age of 18 and directs that the interest or a competent part thereof shall be applied for his benefit until he reaches that age. The legacy is vested (zmi) A bequeaths to B 500 rupees when he shall attain the age of 18

and directs that a certain sum out of another fund shall be applied for his maintenance until he arrives at that age. The legacy is contingent

Note -This section applies to Hindus Buddhists etc. see sec 57 and Sch III It may be compared with sec 21 Transfer of Property Act

Contingent interest -If the event upon which the legacy is directed to be paid be uncertain as to its taking place then the legacy becomes a conditional legacy and will not devolve on the executors or administrators of the legatee unless the condition be performed by the happening of the event-Swinburne Part 7 sec 23 Pl 10 Williams on Executors 11th Edn p 977 If a bequest is made to a person for life and then to such of his children as may survive him then clearly the condition of being alive at his death would be a condition precedent to the vesting itself and in such a case no child that does not so survive will acquire a vested interest in the bequest. The obvious principle underlying this rule of construction is that though the death of the life tenant is certain still it is by no means certain that the dones will survive the life tenant. And if from the words of the gift, the intention of the testator is clear that the persons taking should be only such persons as are alive at the death of the life tenant then it follows necessarily that it is a contingent gift contingent upon the donee surviving the life tenant. Till such contingency is fulfilled there can be no vesting-Adams v Mrs Gray 48 MLJ 707 AIR. 1925 Mad 599 (602) 90 IC 5 A will ran as follows - Upon a son being adopted by my wife he shall upon the death of the vife be entitled to all my properties. If an adopted son he not procurable, then my daughter's son N should he live in my dwelling house will be entitled to my properties that N had merely a contingent interest during the widow's life time the contingency on which he was to succeed being the death of the widow without adopting-Shyama Charan v Sarup Chandra 17 CWN 39 (41) 14 IC 708 Where a will provided that if the testator left a son that son would be the owner and possessor of his property that if he left no son his widow would be the owner and possessor thereof and that in the event of none of them existing his daughter would be the owner and possessor of the same and the testator died leaving his widow and daughter but no son it was held that the widow would succeed to the property as absolute owner and the contingent interest given to the daughter had no chance of becoming vested because the event on the happening of which it could vest (112 the death of her mother) did not take place during the testator's lifetime-Sheo Shankar v Mithana 5 OLJ 606 48 IC 177 (178) No doubt after her mother's death she could

succeed to the property of her mother (who was given an absolute interest) but that was in her own right as heiress to her mother and not under the will—Ibid

A Hindu died leaving a will which ran as follows I hereby authorise my wife to adopt a son. In case of death of an adopted son my wife shall adopt one after another five sons in succession. If my said wife dies without adopting a son or if such son predeceases her without leaving any male issue my estate after the death of the said wife shall pass to the sons of my sister who may be living at the time of my death There were two sons of the testator's sister living at his death. The wife adopted a son who predeceased her unmarried She then died Held that there was a valid contingent gift in favour of the sister's sons, and on the death of the wife the property passed to them-Bhupendra v Amarendra 41 Cal 642 (648 655) 18 CW.N 360 24 IC 458 A devise upon trust of land towards the maintenance of the testator's daughter until she should attain the age of 25 and from and after her attaining that age then upon trust for his said daughter creates a contingent interest in favour of the daughter until she attains 25-Doe d Cadogan v Ewart 7 Ad & El 63b Similarly when the creation of the interest is subject to a condition precedent to be performed by the donce the interest is manifestly contingent until the condition is fulfilled-Phipps v. Williams 5 Sim. 44 Sec Illustration (1111)

If a legacy is payable if and when a contingency occurs and if that contingency occurs during the life time of the testator the legacy cannot be claimed under the will which speaks only from the date of the death of the testator—
Abdul Sakur v Abubakkar 54 Bom 358 AIR 1930 Bom 191 (200) 127 IC 401

Exception -- Where a testator bequeaths a legacy to a person at a future time and either gives him the intermediate interest or directs it to be applied for his benefit the Court there considers the disposition of the interest to be an indication of the testator's intention that the legatee should at all events have the principal and on this ground holds such legacy to be vested-Williams on Executors 11th Edn p 982 Where the principal is given at a distant epoch and the whole income is given in the meantime the Court leaning in favour of vesting has said that the whole thing is given-per Page Wood VC in Pearson v Dolman LR 3 Eq 315 (321) I do not know of any case in which the whole income has been absolutely given for maintenance and yet the legacy has been held not to be vested -per Jessel MR in Bolding v Strungell 45 L.J Ch 208 Thus a testator gave £100 to T at the age of twenty one and directed the intermediate interest to be paid for his maintenance T died under 21 Held that this was a vested legacy the interest having been given for the benefit of T before his legacy became payable-Hogth v Hogth 2 Br C C 4 A bequest was made of £1000 to C when he should have attained the age of 25 The testator empowered his executors and trustees to place the money at interest which he directed to be applied for the education of C as also a part of the principal to put him appprentice and remainder to be paid to him when he should have attained the age of 25 and not before. C died under that age Held that he took a vested interest and his personal representative was entitled to the legacy-Foncreau v Fonereau 3 Atk 645

The words or so much of it as may be necessary clearly indicate that an estate would be vested even where a part of the income is directed to be applied for the benefit of the legatee-Ratambes v Consay 24 BomLR 1124 AIR 1923 Bom 96 (102 104) 70 IC 178 So also if the trustee is given a discretion with reference to the application of the income of the property

pending its falling into posses, on the interest given is still a visited one. Thus, where a testitor directed his executors to realise the ironey of the testator and invest it in public funds and provided that the dividinds arising therefrom shall be applied at the distriction of my executors, towards the maintenance and education of my children until each of my sons attains the age of twenty one years when his share of the dividends shall be paid to him it was held that there was a vested gift to each son of his share of the collected moneys—De Son  $a \times b a 12$  Bom. 137

To bring a case within this Exception there must be a direct gift of a particular fund to the legatee. Where there is no direct gift to the legatee (son) but only a direction to the executor to hand over not any particular fund but the whole of the remaining properties of the testator (which are unascertain able) when the son comes of age and the income of the properties is not directed to be employed absolutely for the son but the executor is directed to maintain the whole family of the testator out of that mome and is authorised even to spend the corpus of the properties for that purpose the case does not fall within the Exception and the bequest of the residue to the son is not vested but contingent on his attaining the age of majority—Conagii v Ralanbai 49 Born. 167 (PC) 27 Born L.R. 1 A IR 1925 PC 27 (29) 84 IC 882

107 (PC) 27 DOMER 1 ATR 1525 1 C 27 (25) 84 1 C 83

Vesting of interest in bequest to such members of a class as shall have attained particular

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121 Where a bequest is made only to such members of a class as shall have attained a particular age, a person who has not attained that age cannot have a vested interest in the legacy

#### Illustration

A fund is bequeathed to such of the children of A as shall attain the age of 18 with a direction that while any child of A shall be under the age of 18 the income of the share to which it may be presumed he will be exentually entitled shall be applied for his maintenance and education No child of A who is under the age of 18 has a vested interest in the bequest

Note —This section applies to Hindus Buddhists etc see sec 57 and Sch III It may be compared with sec 22 Transfer of Property Act

141 Bequest to a class — When estates are not given to any one by name bit o such children as shall attain the age of 21 then the git to such children is contingent and no child before attaining that age can have a vested interest—Festing v. Allen 5 Hare 573 Bull v. Prickard 1 Russ 213 Leake v. Robinson 2 Mer 363 Thomas v. Wilberforce 31 Beav 299 Williams v. Haythorne LR 6 Ch 782 Ballin v. Ballin 7 Cal 218 (223)

Where words of contingency form part of the description of the class of p isons to take eg a gfit to those who shall attain the age of 21 the words must receive their natural construction and no estate would vest in any one till the attains that age. In the absence of something pointing to a different construction or something in the will inconsistent with the literal construction a Court would not be justified in adopting any but the literal meaning—Ballim v Ballim V all v 18 cal 248 (223).

As to the meaning of class see Notes under Sec 98. The rule in this section applies when the interest is created in favour of such members of a class as a ball attain a particular age. But where the testator has provided for all the members of a class the rule does not apply. Thus where a testator gave his

residuary estate to trustees in trust for his nephews and nieces to be paid in certain proportions and at certain times (112 that the share of each nephew shall be paid to him upon his attaining the age of 21 years and the share of each niece to be paid to her on her attaining the age of 21 or previously marrying) with benefit of survivorship between them held that the legatees took vested interests subject to be divested on the death before the contingencies mentioned in the will happened and that the period of distribution alone was postponed but the bequests were valid-Maseyk v Fergusson 4 Cal 304 following Williams v Clark 4 DeG & S 472 Similarly a gift to children when the youngest attains the age of 21 creates a vested interest in favour of every member who attains 21 although he may not live till the youngest attains 21 or the youngest may die under 21-Re Hunter 1 Eq 295 Cooper v Cooper 29 Beav 229 Hughes v Hughes 3 Br C C 35

### CHAPTER IX

## O1 ONEROUS BLOUESTS

Where a bequest imposes an obligation on the Section 10 legatee, he can take nothing by it unless Act X of Onerous bequests. he accepts it fully

### Illustration

A having shares in (X) a prosperous joint stock company and also shares in (Y) a joint stock company in difficulties in respect of which shares heavy calls are expected to be made bequeaths to B all his shares in joint stock companies B refuses to accept the shares in (Y) He fortests the shares in (X)

Note -This section applies to Hindus Buddhists etc. see Sec 57 and Sch III It may be compared with the first para of Sec 127 Transfer of Property Act

142 Principle -The principle is that where onerous and beneficial properties are included in the same gift the legatee cannot disclaim the onerous and accept the beneficial unless the will manifests a sufficient intention of the testator to the contrary-Williams on Executors (11th Edn.) pp 1187 1188 This section lays down a rule of election that where a gift consists of several things some of which are burdened with an obligation he is put to his election either to accept the whole gift or not to accept anything at all

Where a will contains two separate and indepen- Section II 123

One of two separate and independent bequests to same person may be accepted and the other refused

dent bequests to the same person, the Act X of legatee is at liberty to accept one of 1865 them and refuse the other, although the former may be beneficial and the latter onerous

### Illustration

A having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term and which is higher than the house can be let for bequeaths to B the lease and a sum of mon j B refuses to accept the lease He util not by this refusal forfeit the money

Note —This section applies to Hindus Buddhists etc. see Sec 57 and Sch III It may be compared with the first para of Sec 127 Transfer of Property Act

143 Principle—This section also lays down a rule of election Where a testator makes two distinct bequests in the same will to the same person one of which happens to be onerous and the other beneficial prima face the legatee is entitled to disclaim the onerous legacy and to take the other—Gultine v Walrand 22 Ch D 573 Sper v Glasstone 30 Ch D 614 Re Loom [1910] 2 Ch. 230 But in such cases it is a question of the intention of the teator to be gathered from the will whether the legatee must elect to take all or none of the gifts in the will or whether he may accept the beneficial gifts and reput diate that which is burdensome—Talbot v Radnor 3 M & h. 254 Warren v Ruddil 1 J & H 1 Guthne v Walrand 22 Ch D 573.

## CHAPTER X

# Or Contingent Brougsts

Bequest contingent upon specified uncertain event no time being mentioned for its occur

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Where a legacy is given if a specified uncertain event shall happen and no time is mentioned in the will for the occurrence of that event, the legacy cannot take

rence effect, unless such event happens before the period when the fund bequeathed is payable or distrilutable

#### Illustrations

(a) A legacy is bequeathed to A and in case of his death to B II A survives the testator the legacy to B does not take effect

(ii) A legacy is bequeathed to A and in case of his death without children to B If A survives the testator or dies in his lifetime leaving a child the legacy to B does not take effect.

(iii) A legacy is bequeathed to A when and if he attains the age of 18 and in case of his death to B. A attains the age of 18. The legacy to B does not take effect.

(ii) A legacy is bequeathed to A for life and after his death to P and in case of Bs death without children to C The words in case of Bs death without children are to be understood as meaning in case B dies without

children during the lifetime of A.

(1) A legacy is bequeathed to A for life and after his death to B and in case of B's death, to C. The words in case of B's death, are to be considered.

as meaning in case B dies in the lifetime of \( \).

Note —This section applies to Hindus Buddhists, etc; see Sec. 57 and

Sch. III It may be compared with sec. 23 Transfer of Property Act

144 Scope of section —This section applies where there is a gift on
an uncertain contingency and the contangency tales place before the death of the

testator so that the gift may take effect. Thus, if a legacy is bequeathed by A to his brother's widow B and in the event of her death during the testator's blife to the testator's brother's daughter h, this section applies, because the gift

to the nicce depends upon the happening of a specified uncertain event (death of the brother's widow taking place in the testator's life time). But if a legary is bequeathed to the brother's widow B and on her death to the nicce K and the death of the widow does not tale place during the testator's life this section does not apply and the result is that there are successive interests to B and K. This section applies when there is a substantial gift e.g. when there is a gift to K in the event of her mother B predecessing the testator and not when there is a gift of successive interests its gift to B which is followed after her death by the gift to K—Havendra v Basanta 22 CWN 689 (691) 43 IC 991

This section applies to bequests of all descriptions of property there being indifference in India between real and personal property—Narcadra v Aamal basin 23 Cal 563 (573) (PC)

This section applies only when the prior bequest is capable of taking effect and is not void ab unite If a bequest has failed ab unite the principle of sec 116 (now sec 129) applies. Thus where a Hindu testator gave his property to a son to be adopted by his widow and on his dying without male issue during the life time of the widow then to his daighters and the power to adopt given to the widow became void held that the gift to the daughters tool effect as the contingency on which that gift depended happened before the death of the testator the bequest to the adopted son Lalling ab unito—Radha Prasad v. Ranee Mam. 33 Cal. 947 (984) 10 CWN 695

This section does not embody simply a rule of construction for giving effect to the intention of the testator. It hays down a hard and fast rule regulating the validity of certain classes of contingent bequests which must be applied wherever it is applicable will out speculating on the intention of the testator. The language of Illustrations (iv) and (iv) does not control the meaning of the section—Monchiur v. Kaissiaar 3 C.W.N. 478 (482). The rule laid down in this section is a statutory rule of construction which the Courts are bound to follow It is not a rule of construction which can be contradicted by other evidence appearing on the face of the will—Nistamin v. Bekary Lat. 19 C.W.N. 52 (54) 27 I.C. 239. This section does not contain any expression such as unless a contrary intention appears by the will—such an expression should not therefore be implied. Even an expressed declaration of the testator cannot be allowed to control the plain meaning of the section—Narendra v. Namalbasini. 23 Cal. 553 (573) IP.C.)

The word fund means the estate of the testator

145 "No time is mentioned," etc.—Period of distribution— This section embodies what is known as Rule No 4 in Eduards v Eduards (1852) 15 Beav 357 which was enuncated by Sir John Romilly in the following words— Where there is an absolute gift to vest in possession at a future time and a gift over in case the legates should die without issue decease this prima facie is to be taken to mean if he should die without issue before he is entitled to call for delivery and it would be very inconvenient that after delivery the subject of the gift should be hable to go over

This rule has been modified by subsequent rulings of the House of Lords, tit O Mahoney v Bundett (1874) 7 H L 388 Intram v Soutlen (1874) 7 H L 408 But in cases to which see 124 Indian Succession Act applies, this section should be given its full effect instead of having recourse to the English authorities. See Satya Rangin v Annapiuna 48 C.1. 523 A.H. 1929 Cal. 145 (147) 114 I C. 666 Kumud Kriskna v Jogendra 21 C.W.N 854 (858), 41 I C. 511



period of distribution being the death of the testator and the adopted son having died after that period the gift over to the nephews did not take effect—Satya Ranjan v Annapurna 48 CL J 523 AIR 1929 Cal 145 (148) 114 IC 666

A testator in his will authorised his wife to adopt a son and in case of death of further provided that if my said wife dies without adopting a son or if such adopted son predeceases her without leaving any male issue my estate after the death of my said wife heast my my mater sons. Held that the testator distinctly declared the period of distribution to be the date of death of his wife and not the date of his own death that is if the wife died without adopting a son or if the adopted on pred ceased her without leaving any male issue then after the death of his wife the property should pass to the nephews. This section was not applicable and the bequest to the nephews was not affected by this section and must take effect—Bhapendra v Amarendra 41 Cal 642 (647) 18 CWN 189 34 IC 882

A testator bequeathed his properties absolutely to his sons J and P and provided that if P had a on half the property should be made over to that son on his attaining 21 and in case P had no son then J should give his son to P as palak (adopted son) and that all the clauses of the will would be applicable to such palak. The testator died in 1866 leaving P and J In 1897 P died without leaving a son and without adopting any son but after his death J gave his son B as palak to P Held that P took an absolute estate which passed to his legal heirs and the gift over to B (the adopted son) did not take effect The period of distribution was the date of the testator's death. The bequest to the palak son was to take effect on the happening of an uncertain event viz if no son was born to P So long as P was alive there was a possibility of his having male issue and until his death without male issue there was no chance of B becoming a palak son. It follows therefore that the event on the happening of which the legacy to B was to take effect did not occur before the testator's death (which was the period of distribution)-Jehangir v Kaikhusru 13 Bom LR 141 9 IC 951 (955) affirmed by the Privy Council 39 Bom 296 (PC) 17 Bom L R, 197 19 C W N 426

The testator made a will bequeathing his share to his daughter and appoint ing the plaintiff as his executor who was to make over the estate to his daughter on her attaining majority. There was a provision in the will that if the daughter died without children then the plaintiff would get the properties. Held that it was impossible in this case to say that the period of distribution would be the death of the daughter unless at could be held that the daughter took less than an absolute intere t. As the daughter took an absolute interest the period of distribution under the terms of the will could not be postponed later than either the date of the death of the testator or the date when the daughter attained majority whichever event happened later. The gift to the plaintiff could take effect if the daughter died during the testator's life time or if she died during her minority. The daughter having survived the testator and having attained majority the plaintiff took no interest in the property under the will-Kumud Arishna v Jogendra 21 CWN 854 (858 859) 26 CLJ 250 41 IC 511 testator bequeathed a portion of his property to his son and provided that if the son died without marrying or if married without a lineal heir his share should revert to his surviving listers or other heirs. The testator died leaving three daughters and a son Held that the period of distribution was the death of the testator and as the unce-tain event contemplated in the will (namely the testator's son

dying without marrying or if married without leaving a lineal heir) did not take place before the period of distribution the gift over to the daughters did not take effect and the gift to the son became indefeasible at the death of the testator —Sardar Nowron v Pulibar 37 Bom 644 15 Bom L R 352 19 I C 832 (834)

146 Cases -Where there was a bequest to an adopted son and on his death and until another adoption was made the estate was bequeathed to the testator's widow and no time was mentioned in the will for the happening of the death of the adopted son and the adopted son was living at the testator's death held that as the adopted son survived the period of distribution the event specified in the will (se the death of the adopted son) did not happen before the period of distribution and the gift over to the widow could not take effect-Manikyamala v Nanda Kumar 33 Cal 1306 (1314) 11 CWN 12 Where a testator gave his residuary estate to his two sons to be divided between them in equal shares but projuded that if his wife should subsequently beget a son he should also get a share and no such son was born before the period of distribution held that each of the sons took an absolute estate in half share of the residuary estate-Damodardas v Davabhas 22 Bom 833 (841) (PC) Where a testator bequeathed his property to his three sons and in the event of any one dying sonless to the survivors in equal shares and at the death of the testator all the three sons were living held that the time of distribution was the date of the testator's death and as the specified uncertain event (122 the event of a son dying sonless) on which the legacy to the survivors was given contingently had not happened before the period of distribution the legacy to the survivors (in case of one of the sons dving after the death of the testator) could not take effect and that the original gift to the testator's three sons was absolute to each in equal shares and indefeasible on his death-Narendra v Kamalbasini 23 Cal 563 (571 573) (PC) Where the will directed that the testator's daughters would come into possession of his properties in equal shares and there was a further provision that in case of any of the daughters dying childless her share should devolve in equal shares upon the surviving daughters held that this provision of survivorship applied only in the case of a daughter dying during the testator's life time and did not take effect if a daughter died several years after the testator's death-Lala Ramicuan v Dal Kocr 24 Cal 406 (410) A gift over to a person in the event of a minor legatee not having attained full age is valid. The specified uncertain event in this case under this section is the failure of the minor to attain his majority-Durga Pershad v Raghunandan 19 CWN 439 (442) 23 IC 597

A will contained the following provisions — But nevertheless in the event of any son or son s son dying without leaving male issue surviving him the other of my son or sons or sons sons living at the time shall be equally cattiled to his or their share of the property as he or they should inherit under the Hindu Law. The testator ded leaving it wo sons S and A. Thereafter S ded leaving a widow but no male issue. The question was whether there was a valid gift over of the share of S to A or whether the gift to S had become absolute at the death of the testator descending on the death of S to his widow. It was held that the event of a son or sons son dying without male issue referred to in the will was the death of one who had taken something under the organal gift contained in it that is to say a death which must take place after the death of the testator (re after the period of distribution). That being so this section did not apply but that the case was governed by sec. 131 and the gift over to A was perfectly valid—Indian Rom v. Aishop Namar 60 Cal 554 (PC), 37 CWN 153 (161 162) AIR 1932 PC 269,

140 IC 433 affirming Akshoy Kumar v Indita Rani 5b CLJ 417 AIR 1931 Cal 499 135 IC 868

By a will the testator bequeathed his estate to his widow and his two daughters in law and then provided as follows.— In case the said three females die .M son of R my brothers son shall be the heir and possessor of those properties. All the three ladies survived the testator. Held that see 124 would operate so as to but the right of M to take under the will because the event on the hippening of which the estate of the testator became payable to M (viz. the death of the three ladies) did not happen before the death of the testator (that being the time when the estate become distributable)—Kamla Prasad v. Multi 7 P.L. T. 631 94 I.C. 750. A I.R. 1926 Pat. 356

A testator bequeathed his properties to his two daughters providing that be should enjoy the income of his properties without division or alteration but that if they had issue they should divide the properties equally and also that those that had no issue could only enjoy the income those having issue enjoying the whole properties. Held that the birth of the issue was the event on which the absolute gift of a half share to either daughter was to take effect and that the words have issue should not be construed as leave issue and of ion of the daughters had issue but that issue ided in her life time that daughter took an absolute and heritable estate which after her death would go to her own heir and not to her surviving sister—Gurusami v Sitakami 18 Mad 347 (337 338) (PC)

A Hindu in his will provided as follows - I bequeath to both of you (the testator's wife and mece) the rest of the properties with power of sale gift etc if by the will of God one of you should die before the other whoever will survive will hold and enjoy the whole of the property Held that the survivor ship mentioned in the will referred to survivorship at the death of the testator's death (which must be taken to be the period of distribution) and the widow having survived the period of distribution took an absolute estate-Nistarins v Behary Lal 19 CWN 52 (54) 27 IC 239 A testator gave his property to his son R and a clause in the will provided should R die and should he then leave a son such son shall afterwards be the owner thereof contended that this clause should be construed as if R should die before the death of the testator and that as the specified uncertain event via the death of R before the death of the testator did not happen (R having survived the te tator) this clause in the will was inoperative. Held that that clause should not be so construed as to mean that the testator had in his mind the possibility of the death of R before his own death and this section was mapplicable. The case was covered by sec 113 that is R took an estate for life and after his death the whole of the remaining interest went to Rs sons (who were not in existence at the testator's death) - Gulban v Rustompt 49 Bom 478 27 Bom LR 380 AIR 1925 Bom 282 (286 287)

The testator bequeathed to his daughter A an annuity which in the event of her death was to pass to her heirs. A died after the testator Held that this section did not apply, and A is heirs were entitled to the annuity. They were not precluded from claiming the annuity by reason of A having survived the testator. The will should not be so construed as to mean that A is heirs voild be entitled to the annuity only if A died during the life time of the testator—Gui annui v Deb Prosamia 23 CWN 1038 54 IC 897. A Hindu died leaving a will in which he made provision for his wives and daughters who survived him. The clause providing for the daughters was. When they will be matried and if they desire to live in separate houses the person in

whose management my property will be at the time will make separate house for them from the income of my property. For the maintenance of each of my daughters I fix an allowance of Rs. 600 a year. As long as the daughters will live in separate houses they will get the fixed allowances. The daughters married and lived in separate houses. In suits for their allowances at was contended that the bequests to them were given in the uncertain event of their marriage and as that event did not happen until after the death of the testator the bequests were void by reason of this section. Held overruling this contention that the payment of the maintenance was not made contingent on the marriage of the daughters. The will dealt with the maintenance in a clause which stood by itself and which must be read by itself. That clause contained no reference to marriage or to any other future event. This section therefore had no bearing on the construction to be put on the bequest—Chundra Kishore v Prasuma Kumari. 38 Cal. 327 (333) (PC) 15 CWN 121 13 CLJ 58 9 IC. 122

A testator directed that his wife and daughter should each have an absolute interest in the property and he further provided that if my wife dies before my daughter shall get the property. The testator deed leaving his widow and daughter both Held that this section applied. Whether the wife would die in the life time of the testator or after him was an uncertain event and the daughter was allowed the interest that was given to her by the will (i.e. absolute interest) only in case the wife died in the life time of the testator. But as the wife survived the testator she took an absolute interest and after her death the daughter had only a life interest according to Hindu Law—Jagat Bipoy v Tomitudis 44 Cal 181 (181) 39 IC 2018

Bequest to such of certain persons as shall be surviving at some period

n 112

of

Where a bequest is made to such of certain persons as shall be surviving at some as shall be period, but the exact period is not specified, the legacy shall go to such of them

not specified as are alive at the time of payment or distribution, unless a contrary intention appears by the will

### Illustrations

(1) Property is bequeathed to A and B to be equally divided between them or to the survivor of them If both A and B survive the testator the legacy is equally divided between them If A dies before the testator and B survives the testator it goes to B

(ii) Property is bequeathed to A for life and after his death to B and C to be equally divided between them or to the survivor of them B dies during the life of A C survives A A At As death the legacy goes to C

(iii) Property is bequeathed to A for life and after his death to B and C or the survivor with a direction that if B should not survive the testator is children are to stand in his place C dies during the life of the testator B survives the testator but dies in the life time of A. The legacy goes to the representative of B.

(i) Property is bequeathed to A for life and after his death to B and C with a direction that in case either of them dies in the life time of A the whole shall go to the survivor B dies in the life time of A The legacy goes to the representative of C

Note —This section applies to Hindu Buddhists etc. see Sec 57 and Sch III It may be compared with sec 24 Transfer of Property Act

## CHAPTER XI

## OI CONDITIONAL BIQUESTS

Bequest upon impossable condition

126 A bequest upon an impossible Section 113 condition is void

Act X of 1865

#### Illustrations

(1) An estate is bequeathed to A on condition that he shall walk 100 miles in an hour The bequest is void.

(ii) A bequeaths 500 rupees to B on condition that he shall marry As

daughter As daughter was dead at the date of the will The bequest is void Note .- This section applies to Hindu Buddhists etc see Sec 57 and

Sch III It may be compared with sec 25 Transfer of Property Act.

- 147 Condition precedent and condition subsequent -The condition referred to in this section is a condition precedent. The following are the points of distinction between a condition precedent and a condition subsequent --
- (1) A condition precedent is one which must happen before the estate can commence. A condition subsequent is one by the happening of which an existing estate will be divested
- (2) Where the condition is precedent the estate is not in the grantee until the condition is performed but where the condition is subsequent the estate immediately vests in the grantee and remains in him till the condition is broken -Wynne v Wynne (1840) 2 M & G 8 (at p 14)
- (3) In the case of a condition precedent being or becoming impossible to be performed or being immoral or opposed to public policy the estate will not arise and the bequest will be void (See secs 126 127) But in the case of an impossible or immoral condition subsequent the estate will be or becomes absolute and the condition will be ignored. Thus, if a gift is made with a condition super added that the donce shall marry a certain person on or before she attained the age of 21 and the person named died before she attained that age it was held that the fulfilment of the condition subsequent having become impossible the estate became absolute-Thomas v Houell 1 Salk 170 Graydon v Hicks (1739) 2 Ath 16 Darley v Longworth, 3 Brown's (PC) 359 Jarman on Wills Vol II p 12 A gift to which an immoral condition is subsequently attached remains a good gift though the condition is void-Ram Sarup v Bela 6 All 313 (PC)
- (4) A condition subsequent must be strictly fulfilled (sec 132) but a condition precedent is fulfilled if it is substantially complied with (sec. 128)
- 148 Construction -Whether a condition is a condition precedent or subsequent is a question of construction in each case-Robinson v Wheelinght (1855) 6 DeG M & G 535 Duffield v Duffield 3 Bh N S 260 Acherley v Vernon (1720) 3 Bro P C 107 No words are necessary to make a condition precedent. The same words would make a condition precedent or subsequent according to the nature of the thing and the intention of the parties-per Willes CJ in Acherley v Vernon supra A condition which involves anything in the nature of a consideration is in general a condition precedent-Ibid Fitzgerald v Ryan (1899) 2 Ir 637 But where the condition requires something to be done which will take time the Court will be in favour of treating it as a condition subsequent-Theobald on Wills (6th Edn.) p 546 Popham v Bamfield 1

n 114

of

Vern 79 If the language of the instrument leaves it in doubt whether a condition is intended to be precedent or subsequent the Court prefers the latter— Goodhart v Boodhard [1903] 1 Ch 749

149 Impossible condition—The fulfilment of a condition may become impossible either at the time the interest is created or subsequently, but in either case the bequest will fail. See Jarman on Wills Vol. 2 p. 12. When the fulfilment of a condition becomes impossible by act of God the condition becomes void and the bequest fails—Indu p. 13. But if the performance of the condition becomes impossible by the fraud of a person interested in the non fulfilment of the condition the condition shall as against him be deemed to have been fulfilled see section 137.

Where a bequest was made conditional on re-excavation of a certain tank by the legatee and the condition became impossible by reason of the testator himself re excavating the tank after the date of the will held that the bequest failed and the legatee could not take anything under the will. Although it is true that on general principle the donce ought to be discharged of the condition where the testator him elf has put the performance out of the power of the donee still the intention of the testator cannot be ignored. The intention (as cathered from the terms of the will) being that the water difficulty of the people of the locality should be removed by re excavating the tank and the essence of the intention being that the legacy should be applied in the re-excavation of the tank the impracticability of performance of the condition by the legatee by reason of the performance of the act by the testator himself became a bar to the claim of the legatee-Rasendra v Mrinalini 48 Cal 1100 (1103) 26 CWN 378 AIR 1922 Cal 116 64 IC 977 Where a condition precedent becomes impossible to be performed even though there be no fault or laches on the part of the devisee himself the devise fails-Ibid (at p 1104) Lowther v Cavendish (1857) 1 Eden 99 (116) Priestly v Holgate (1857) 3 K & J 286

But where no such motive or intention appears in the will the impossibility of fulfillment of the condition by reason of the act of the testator discharges the condition. Thus a testator in his will provided that if his wife lived per mannently in his family dwelling hou e she vould get for her maintenance Rs. 50 per month but that she would forfeit the gift by residing in her father's house and there was also a statement in the will that he had then no family dwelling house but he intended to build one and if he did not do so his executors should build a family dwelling house if they thought necessary. There was no family dwelling house at the time of the testators death nor any built later Held that as no family dwelling house was built by the testator or by the executors the widow was entitled to the annuity even if she lived in her father's house or elsewhere—Satisk Chandra v. Sand Stundari 88 IC 103 (Cal.)

~ 127 A bequest upon a condition, the fulfilment of

Bequest upon illegal or which would be contrary to law or to

morality, is void

### Illustrations

(1) A bequeaths 500 rupees to B on condition that he shall murder C The bequest is void (ii) A bequeaths 5000 rupees to his niece if she will desert her husband

The bequest is void

Note ... This section applies to Hindus Buddhists etc. see Sec 57 and
Sch III. It may be compared with sec 25. Transfer of Property Act.

Contrary to law, etc .- A condition in absolute restraint of marriage is void-Sitaram v Aheree 11 BLR 129 Perrim v Lyon (1807) 9 East 170 Jones v Jones (1876) 1 QBD 279 Dashwood v Bulkeley (1804) 10 Ves 230 See also sec 36 Indian Contract Act But a condition that marriage shall not be entered into before attaining the age of 21 or any other reasonable age is valid-Stackhole v Becament (1796) 3 Ves 89 so also a condition that the grantor's consent shall be taken b fore marriage is not void-Chauncey v Grandon (1743) 2 Atk 616 Where a testator in his will bequeathed a certain portion of his property to his grand daughter (son's daughter) but imposed a condition that she would be divested of the bequest if she married within the life time of her father such a condition was not void. Under no reasonable construction of the clause it can be said that the condition was contrary to law or morality if the lady was not married at the date of her father's death. The intention of the testator was that it would be the recog nised duty of his son to see to a suitable marriage of his daughter during his life time and that if it was done that would be a sufficient provision for her and no disposition of property in her favour was necessary. It cannot be said that such a provision tends to penalize her marriage and is consequently hit by sec 127-Cohen v Cohen 59 Cal 102 AIR 1932 Cal 350 (351) 137 IC 482 not following In re Lanson [1927] 2 Ch 264

A bequest under a will made conditional on the continuance in future of immoral relations between the legatee and the testator is void by reason of such condition. The fact that the will spoke only from the date of the testators death, when the consideration had become past and performed and that past cohabitation is a good consideration is not a ground for validating the bequest because at the time when the will was made the condition precedent to the gift was future cohabitation—Tayaramma v Sitaramesami 23 Mad 613 (615)

Conditions which are illegal or contrary to the policy of the law are void-Egerton v Earl Brounlow 4 HL 1 A condition that if the beneficiary enter into the military or naval services of the Crown he will be divested of the property is void as against public policy-In re Beard (1908) 1 Ch 383 A gift over in the event of a change of religion by the legatee is valid-Hodgson v Halford 11 Ch D 959 Conditions which require the separation of husband and wife are invalid. Conditions decreasing an annuity if the annuitant again lives with her husband or increasing a legacy to a husband in the event of a separation from his wife are invalid-Bean v Griffiths 1 Jur (NS) 1045 Carturight v Carturight 3 D M & G 982 Wilkinson v Wilkinson 12 Eq. 604 A condition which places a limitation to endure during the separation of husband and wife is wholly void-In re Moore 39 Ch D 116 Conditions not to dispute a will are valid if the will is unsuccessfully disputed. But it will not avail to make an invalid disposition good-Cooke v Turner 15 M & W 727 Evanturel v Evanturel LR 6 (PC) 1 Stevenson v Abinedon 11 WR. 935

Fulfilled Section 115 before the legatee can take a vested 1865 interest in the thing bequeathed, the condition shall be considered to have

been fulfilled if it has been substantially complied with

### Illustrations

(i) A legacy is bequeathed to A on condition that he shall marry with the consent of B C D and E. A marries with the written consent of B C is S—24

present at the marriage. D sends a present to A previous to the marriage. E has been personally informed by A of his intentions and has made no objection. A has fulfilled the condition

(11) A legacy is bequeathed to A on condition that he shall marry with the consent of B C and D D dies. A marries with the consent of B and C A

has fulfilled the condition

(iii) A legacy is bequeathed to A on condition that he shall marry with the convert of B C and D A marries in the life time of B C and D with the consent of B and C only A has not fulfilled the condition

(11) A legacy is bequeathed to A on condition that he shall marry with

the consent of B C and D A obtains the unconditional assent of B C and D to his marriage with E Afterwards B C and D capriciously retract their

Consent. A marries E A has fulfilled the condition that he shall marry with the consent of B C and D A marries without the consent of B C and D but

obtains their consent after the marriage. A has not fulfilled the condition.

(1) A makes his will whereby he bequeaths a sum of money to B if B shall marry with the consent of As executors. B marries during the life time of

A and A afterwards expresses his approbation of the marriage A dies. The bequest to B takes effect (vii) A legacy is bequeathed to A if he executes a certain document within a time specified in the will. The document is executed by A within a reasonable time but not within the time specified in the will. A has not performed the condition and is not entitled to receive the legacy

Note -This section applies to Hindus Buddhists etc. see Sec. 57 and Sch III It may be compared with section 26 Transfer of Property Act

Fulfilment of condition precedent -This section is based upon the principle of favouring the early vesting of estates. See Scott v Tyler 2 W & T L C 146 This section and the next lay down the doctrine of cy pres with reference to the fulfilment of a condition precedent. It is sufficient if a condition precedent is performed cy pres ie so performed as to substantially fulfil the testator's intention see Williams on Executors 11th Edn p 1013

A condition precedent is fulfilled if it is substantially complied with but a

condition subsequent must be strictly fulfilled (sec 132)

Conditions subsequent that go in defeasance shall be taken strictly for they are odious and therefore unless they are strictly fulfilled the ulterior dis po ition shall not take effect. But in the case of a condition precedent as the estate cannot commence until the condition is performed the condition is bene ficial as creating an estate and ought to be construed favourably-Scott v Tyler (1787) 2 W & T L C p 146 The law is always in favour of vesting of estates (Taylor v Graham 3 App Cas 1287) and a condition precedent should be taken in favour of the devisee

Where a testator bequeathed a legacy to his brother and nephew on condition that the legatees should humbly apply for subsistence but the legatees instead of humbly applying claimed as of right and claimed twelve times the amount of the bequest as maintenance suitable to their dignity held that the condition was not complied with and the bequest failed-Verrabhadra v Claranjit: 28 Mad 173 (180 181) (PC)

Where a house is given on condition of residence therein but no manner or period of residence is prescribed the occasional use of the house and keeping an establishment therein with the intention of using it again as residence is a sufficient compliance with the condition-Tagore v Tagore 1 I A 387 14 BLR 60 22 WR 377 A condition of residence implies personal residence but it may be satisfied by keeping up an establishment at the house and visiting it occasionally though without passing the night there-Walcott & Boatfield Kay 534 Warner v Mour 25 Ch D 60a.

Where there is a legacy on condition of the legatee marrying with the consent in uniting of a certain person and consent will be sufficient to fulfil the condition—Scatt v Tyler (1787) 2 W & T LC 146 2 Bro C C 433 Where consent of several persons is prescribed consent of the majority is sufficient. Thus where the consent of the trustees or executors is conditioned and one trustee or executor disclaims it is sufficient to obtain the consent of the majority—Warthington, V Ears. (1823) 1 L J Ch 125 24 RR 160

Bequest to A and on failure of prior bequest to the prior bequest shall fail, the Become 11 ft the prior bequest shall fail, the 1865 second bequest shall take effect upon

the failure of the prior bequest although the failure may not have occurred in the manner contemplated by the testator

#### Illustrations

(t) A bequeathed a sum of money to his own children surviving him and if they all die under 18 to B A dies without having ever had a child. The bequest to B takes effect.

the property of B takes effect

(ii) A bequeathed a sum of money to B on condition that he shall execute
a certain document within three months after As death and if he should
neglect to do so to C B dies in the testator's life time. The bequest to C

Note —This section applies to Hindus Buddhists etc see Sec 57 and Sch III It may be compared with the first para of sec 27 Transfer of Property Act

152 Acceleration —This section enunciates the doctrine of acceleration A gift in remainder expectant on the termination of an estate for life does not fail but is accelerated by reason of the gift of such prior life estate not taking effect—Apidhna v Rakhman 10 Cal 482 (489) (PC) following Lansion v Lansion is Beax 1. Where in a sense of successive limitations a particular estate is void ab mitto the remainder which is immediately expectant upon such estate accelerates. This where there was a gift to the testators daughter of real and personal estate during her life-time and after her decease the property to be equally divided b.tween her children on their coming of age and the gift to the daughter was void on account of her having attested the will it was held that the gift to the children was accelerated and took effect immediately—Jully v Jacobs (1876) 3 Ch D 703

So also where the prior estate is revoked by the donor and thus fails the remainder immediately expectant upon it accelerates—Fell v Biddolph (1875) LR 10 CP 701

When there is a gift to a legatee with a gift over if the legatee neglects to perform a condition the gift over takes effect if the legatee never comes into existence or dies before the testator or if the gift to the legatee is itself void so that the legatee is never able to perform the condition and thus the prior disposition fails—Scatternood v. Edge 1 Sall. 229 Ardyn v Ward (1749) I Ves. 420 Re Green Estate (1880) 29 L. J. Ch. 716. Thus where there was a devise on condition that the devisee should execute a lease in three months after the testator's death but if he should neglect to do so the devise was to go over and the devisee ched in the life-time of the testator the devise over was held to take effect—Artlyn v. Ward supra.

Under this section the second bequest takes effect upon the failure of the prior bequest although the failure may not have occurred in the manner con templated by the testator In other words the clause of apparent condition is regarded as a clause of conditional limitation so as not to require that the very event on which the gift is made contingent must be fulfilled with strict exactness but regard is had to the substantial effect of the contingency specified This is the rule laid down in Jones v. Westcome (1711) 1 Eq. Cas. Abr. 245 Meadous v Parrs (1812) 1 V & B 124 Murray v Jones (1813) 2 V & B 313 Azelan v Ward (1749) 1 Ves. 420 Where a testator made a gift to a son to be adopted by his widow and on his death without issue in the widows life time to his daughters and the power of adoption given to the widow became yold held that the executory gult to the daughters took effect as the prior gult failed ab unitio by reason of its object never coming into existence though it did not fail in the particular manner indicated in the will-Radha Prasad v Rance Mant 33 Cal 947 (963) 10 CWN 695

A devise was made by A to his child en centre sa mere under the mis apprehension that his wife was enciente and if such child died before a certain age then a gift to another. When it was found that the wife was not enciente the ulterior estate became accelerated and did not become void-Wing v Angrave 8 H L C 183 Hall v Warren 9 H L C 420 Jones v Westcomb 1 Eq Cas Abr 245 Where a testator directed that if his wife (who was pregnant at the time) should bring forth a on his property should go to the son and if a daughter she should only have a right of maintenance and that if the son born should die before attaining age the property should go over to the testator's brother N and the wife gave birth to a daughter held that the gift over in favour of N took effect on failure of the gift to the son even though such failure was not in the precise manner expressed in the terms of the gift-Okhovmonev v Nilmoney 15 Cal 282 (291) Where a testator provided that if his son died a minor and his widow survived him she would acquire the property before the two daughters but the widow predeceased the son (10 the event did not happen in the exact order contemplated by the testator) held that this fact did not deprive the two daughters of the benefit of the legacy given to them by the testator-Durga Prasad v Rashu Nandan 19 CWN 439 (442) 23 IC 597

Where the will shows an intention that the second

When second bequest not to take effect on failure of first

bequest shall take effect only in the event of the first bequest failing in a particular manner, the second bequest

shall not take effect, unless the prior bequest fails in that particular manner

### Illustration

A makes a bequest to his wife but in case she should die in his life time bequeaths to B that which he has bequeathed to her. A and his wife perish together under circumstances which make it impossible to prove that she died before him the bequest to B does not take effect.

153 This section applies to Hindus Buddhists, etc. see Sec. 57 and Sch. III It may be compared with the second para of sec 27 Transfer of Property Act The Illus ration to this section is taken from Underwood v Hing 4 DeG & G 633

ion 117 X of

Wh c er the vords plainly import a condition as in the testator's contempla tion and where that condition cannot be understood to have been substantially compled with by the event which has actually happened the gift over fails-Williams on Executors 11th Edn p 1017

This ection qualifies to some extent the rule in sec 129 But unless there are express words (or necessary implication) showing the intention of the testator that the gift over shall not take effect unless the condition on which the gift is made contingent is fulfilled with strict exactness, the general rule in sec. 129 vill have operation and the gift over will take effect on failure of the prior bequest-Radha Prasad v Ranee Man: 33 Cal 947 (963) 10 CWN 695

A Hindu made a will which provided I give and bequeath the whole of the re iduary estate to my grandson or grandsons who may be born or will be born to my son K within ten years after my death if there shall be no such grand on to be born as aforesaid the whole of my residuary estate is to be divided equally between my said grand daughters after the death of my said The testator died in 1897 leaving a widow and one son. In 1899 se within 10 years of the testator's death a grandson was born Held that the bequest in favour of the grandsons being a bequest to a person not in existence at the death of the testator vas invalid. But as the will provided that the gift over to the grand daughters was to take effect only if there was no grand son actually born within ten years and as the grandson was in existence the bequest in favour of the grand daughters could not take effect under sec 130 Succession Act Therefore the bequest to the grandson being invalid and the gift over to the grand daughters having failed there was an intestacy and the grandson took the whole estate as hear at law-Official Assignce v Vedavalli Thayarammal 51 MLJ 182 97 IC 163 AIR 1926 Mad 936 (938)

(1) A bequest may be made to any person with Section 118 the condition superadded that, in case Act X of Bequest over condi

tional upon happening or not happening of specifed uncertain event

a specified uncertain event shall happen. the thing bequeathed shall go to another person, or that in case a specified

uncertain event shall not happen, the thing bequeathed shall go over to another person

(2) In each case the ulterior bequest is subject to the rules contained in sections 120, 121, 122, 123, 124, 125,126. 127, 129 and 130

#### Illustrations

(a) A sum of money is bequeathed to A to be paid to him at the age of 18 and if he shall die before he attains that age to B. A takes a vested interest in the legacy subject to be divested and to go to B in case A dies under 18 (ii). An estate is bequeathed to A with a proviso that if A shall dispute the competency of the testator to make a will the estate shall go to B. A disputes the competency of the testator to make a will. The estate goes to B. A disputes the competency of the testator to make a will. The estate goes to B. A disputes the competency of the testator to make a will. The estate goes to B. A disputes the competency of the testator to make a will. The estate goes to B. A disputes the competency of the testator to make a will. The estate goes to B. B takes a wested until the dispute of B. B takes a vested unterest in the legacy subject to be divested if he dies leaving a son in A so life time.

(10) A sum of money is bequeathed to A and B and if either should die during the life of C then to the survivor living at the death of C A and B during the life of C. The gift over cannot take effect but the representative of A takes one-half of the money and the representative of B takes the other half

(v) A bequeaths to B the interest of a fund for life and directs the fund to be divided at her death equally among her three children or such of them as shall be living at her d ath. All the children of B de in B s life time. The bequest over cannot take effect but the interests of the children pass to their representatives.

Note —This section applies to Hindus, Buddhists, etc. see Sec 57 and Sch. III. It may be compared with sec 28. Transfer of Property Act

154 Condition superadded—It means condition subsequent Examples—(a) The death of the donee without leaving a son or sons son

-Sootjeemoney \( \) Denobundhoo \( 6 \) MIA \( 526 \) Natalchand \( \) Manekchand \( 23 \) Bom LR \( 450 \) \( 62 \) IC \( 98 \) (99) \( (b) \) The donee marrying or not marrying a particular person or class \( o^4 \)

(e) The death of the donee before attaining a certain ace—Doe d Hunt v

Moore (1811) 14 East 601 Maseyk v Ferguson 4 Cal 304

(d) Condition precluding the legatee from disputing the validity of the will —Cooke v Turner (1847) 15 M & W 727 See Illustration (ii)

(e) Change of religion-Seymour v Vernon 33 L J Ch 690

(f) Where a testator gave a devisee absolute proprietary rights in the property and added a direction that in case any portion of the estate bequeathed was left undisposed of on the death of the devisee that was to be taken over by another person named in the will held that the disposition in favour of the person so named was valid and he could take under the will whatever remained undispo ed of by the devisee—Indar Kwar v Chheda Singh 22 OC 7 50 IC 197 (199 200)

(g) A bequest in favour of a Church was subject to a condition that no ordained Minister or missionary be ever elected as a Deacon of the Church or be allowed to canvass for votes. In the event of the non fulfilment of the conditions there was a gift over in favour of another Church. On non fulfilment of those conditions it was held that the gift over came into operation—Administrator General v. Hunters 40 Cel. 192 (211) 2.1 I.C. 183

A testator may give an absolute estate to a legatee with the condition superadded that the legatee shall personally live in the house and that if he does not live personally in the house his interest shall cease and the estate will go over to some one else—Shipama Chaian v Sarup Chandra 17 CWN 39 (41) 14 IC 708 A Hindu will provided that of the two sons M and V of the testator M should give one half of the property to V if the latter should turn to good ways and reside with M respectably After the death of the testator and even before it the two brothers lived in amity so that it may be said that V reformed himself and lived re pectably with M It was held that on the happening of the ur ertain event (which in this case was the reformation of V) half the estate which under the will vested in M vent over to V—Shankar Mahableshuar v Manyanath A II R 1924 Bom 298 (299) 74 IC 298

A testative gave her whole property to her son and daughter and provided that if either of them was to the unmarried the other to take the whole and that if both were to die unmarried one of the step children was to take. The son married and died leaving a widow and later the daughter died unmarried Held that the son and the daughter took vested interest under the will subject to being divested in the event of happening of certain conditions. As the son married and predecea ed the daughter the possibility of the estate taken by them becoming divested under the will came to an end and the gift over to the step children did not take effect the estate must be regarded as

having vested absolutely in the daughter and her heirs and hence on her death her heirs succeeded-Mrs Chandler v Administrator General 85 IC 564 AIR 1925 Lah. 594 (595)

A Hindu testator made his will whereby he bequeathed his property suc cessively to the three sons of his sister in the following manner. In the first place it was to go to one of the sons absolutely subject to the condition that if he died without male issue surviving it was to go to the second. The latter was also given an absolute estate but it was similarly liable to be defeated if he in his turn died without leaving male issue in which event the property was to so to the third son subject to a similar condition. Ultimately the property was devised in favour of a chanty. The first two sons died without male issue and the third son sued for the construction of the will and for a declaration of his rights to the property. Held that although the testator might have defeated the absolute estate which he gave to the first son by a gift over to the second son in accordance with the provisions of this section he could not attach a condition to the gift over and thus further restrict the devolution of the estate in a manner unknown to Hindu law by directing that the second son was not to take an absolute estate but an estate in tail male. The estates which were intended to be created by the testator in this case being thus a succession of estates in tail male the original gift over was bad in its creation and failed absoluters and the first son took an absolute estate which on his death would go to his daughter as his heiress-Bas Dhanlaxms v Hamprasad 45 Bom 1038 (1043 1047) 23 Bom L R. 433 A J R 1921 Bom. 262 62 J C 37

For a recent Privy Council ruling see Indira Rans v Akshoy Kumar 60 Cal 554 cited in Note 146 under sec 124

Construction -A condition subsequent is odious in law and must be submitted to a strict construction. If an estate is to be defeated it must be so by clear and express terms within the limits of the instrument creating it Ordinarily the usual meaning must be given to each expression used on the face of the document. But if it is found that the expressions are vague or irrelevant or otiose it will be permissible to mould words to particular purposes in order to get at the sub tance of the testator's intention-Egerton v Brownlow (1854) 4 H L C 1 (per Lord St Leonards)

132 An ulterior bequest of the kind contemplated by Section 119 Condition must be section 131 cannot take effect, unless 1865 the condition of the conditio the condition is strictly fulfilled

### Illustrations

(r) A legacy is bequeathed to A with a proviso that if he marries without the consent of B C and D the legacy shall go to E D dies. Even if A marries without the consent of B and C the gift to E does not take effect.

(ii) A legacy is bequeathed to A with a proviso that if he marries without the consent of B the legacy shall go to C A marries with the consent of B He afterwards becomes a widower and macries again without the consent of B The bequest to C does not take effect.

(iii) A legacy is bequeathed to A to be paul at 18 or marriage with a proviso that if A dies under 18 or marries without the consent of B the legacy shall go to C A marries under 18 without the consent of B The bequest to C takes effect.

C takes effect

Note -This section applies to Hindus Buddhists etc. see Sec. 57 and Sch III It may be compared with sec. 29, Transfer of Property Act

156 Fulfilment of cendition sub-equent —With respect to the performance of conditions subsequent the general rule is that they are to be construed with great strictness as they go to divest estates already vested. Therefore the very event must happen or the act with all its details must be done in order to deprive the legatee of his legacy. This if legacies be given to two persons and if either the during the life of A then to the survivor living at the death of A and both the legatees doe before A the personal representatives of both will be entitled for the legatees took vested interests at the death of the lestator subject to be divised in favour of the survivor who might be living at the death of A but as there was no survivor at that period the divesting contingency never happened—Harrison V Foreman (1799) 5 Ves 200.

A condition subsequent which is impossible of performance is ignored as non existent and does not defeat the vested interest—In re Brown Will 18 Ch D 61 Thus where there was a clause in a gift to the donor's daughter that she should marry his implies at or before the attained the age of 21, and the nephew died before she attained that age it was held that the condition subsequent having become impossible of performance by the act of God must be impored—Thomas w Houell 1 Salls 170 Gravidow 1 ticks 2 At 16

Where only a portion of the condition is impossible the non performance of the impossible portion may be excused—Collett v Collett 35 Beav 312

on 120 X of

Original bequest not affected by invalidity of second

y 133 If the ulterior bequest be not valid the original bequest is not affected by it

# Illustrations

(1) An estate is bequeathed to A for his life with a condition superadded that if he shall not on a given day walk. 100 miles in an hour the estate shall go to B The condition being void A retains his estate as if no condition had been inserted in the will

(11) An estate is bequeathed to A for her hie and if she do not desert her husband to B A is entitled to the estate during her life as if no condition

had been inserted in the will

(ii) An estate is bequeathed to A for life and if he marries to the eldest son of B for life B at the date of the testators death had not had a son The bequest over is void under section 10o and A is entitled to the estate during his life

Note —This section applies to Hindus Buddhists etc. see Sec. 57 and Sch III It may be compared with sec 30 Transfer of Property Act.

157 The principle of this section is that specific trusts or specific estates good in themselves are not invalidated by a subsequent illegal disposition of the residue or remainder—Ansihnaraman v Ananda 4 B.L.R. OC 231 Tagore v Tagore 9 B.L.R. 377 (P.C.) Abetter v Ganganaram 4 C.W.N. 671 (Foot note). The general rule is, that an absolute interest is not to be taken away by a gift over unless that gift over may itself take effect—Green v Hartey (1812). I Hare 428 (431). Wintknorth v Wintknorth (1815) 8 Beav 576. See also Bau Dhanlasmi v Haniprasad 43 Bom. 1038 (cited under sec. 131) where the absolute interest to the first nephes was not affected by the illegal gift over to the second and third neohews.

The ulterior disposition may fail for several reasons, as for instance where the condition on which it depend is illegal—Ridging v Boodhouse (1813) 7 Beav 437; Egenton v Lord Brownlow (1851) 4 HLC 1; or is too remote—Ring v Hart ek (1840) 2 Beav 3.2 Blease v Burgh (1840) 2 Beav 3.2 Blease v Burgh (1840) 2 Beav 3.2

(226) or is impossible—Aislabie v Rice 3 MHCR 256 or is too vague or uncertain-Fillingham v Bromley T & R 530 Clavering v Ellison 7 HLC 707

Bequest conditioned that it shall cease to have effect in a case a specified uncertain event shall hap pen or not happen

134 A bequest may be made with Section 121 the condition superadded that it shall Act X of cease to have effect in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen

**Illustrations** 

(1) An estate is bequeathed to A for his life with a proviso that in case he shall cut down a certain wood the bequest shall cease to have any effect

A cuts down the wood He loses his life interest in the estate (ii) An estate is bequeathed to A provided that if he marries under the age of 25 without the consent of the executors named in the will the estate shall cease to belong to him. A marnes under 25 without the consent of the executors. The estate ceases to belong to him.

(iii) An estate is bequeathed to A provided that if he shall not go to England within three years after the testator's death his interest in the estate shall cease. A does not go to England within the time prescribed. His interest

in the estate ceases

(10) An estate is bequeathed to A with a proviso that if she becomes a nun, she shall cease to have any interest in the estate. A becomes a nun. She

loses her interest under the will

(v) A fund is bequeathed to A for life and after his death to B if B shall be then living with a proviso that if B shall become a nun the bequest to her shall cease to have any effect B becomes a nun in the life time of A She thereby loses her contingent interest in the fund.

Note -This section applies to Hindus Buddhists etc. see Sec. 57 and Sch III It may be compared with sec 31 Transfer of Property Act

158 A condition in a husband's will requiring residence in the family house or in a holy place to entitle his vidow to maintenance is valid and a breach of such condition will work as a forfeiture of her rights mentioned in the will-Bhobo Tarini v Peary Lat 24 Cal 646 (656) Mulji v Bai Ujam 13 Born 218 (220) Girsanna v Honama 15 Born. 236 (238) So also where a will purports to give an absolute interest with the condition that the devisee should have an interest so long as he resided in the house of the testator the condition is valid under this section-Ambika Charan v Sasitara 22 CL I 61 30 IC 868 (870)

But a breach of condition due to no fault of the legatee will not work as a forfeiture. Thus where the testator made a grant of maintenance to his widow conditional on her residing at the testator's house but the widow was compelled to reside elsewhere by reason of the conduct of her husband's rela tives who lought to blacken her character it was held that she did not forfeit her maintenance-Mulji v Bai Ujam supra. So also a breach of a condition sub equent on account of duress does not defeat the interest. Thus a testator directed that if any of the female members of his family either from misunderstanding or from any other cause should wilfully and deliberately leave the family dwelling house and live in any other than a holy place they should forfest their rights under the will The plaintiff a widowed and minor daughter in law of the testator was taken away from the house by her maternal relations and her brother with the aid of the police and she resided with her mother

Held that there was a plain case of duress at the time of leaving the house and that the absence of the gul although in contravention of the direction of the testator was not intentional and therefore ought not to be treated as working as a forfeiture of her right-Tincours v Arishna Bhabini 20 Cal 15 (17)

on 122 X of

Such condition must not be invalid under section 120

In order that a condition that a bequest shall cease to have effect may be valid, it is necessary that the event to which it relates be one which could legally

constitute the condition of a bequest as contemplated by section 120

This section applies to Hindus Buddhists etc. see Sec. 57 and Sch. III It may be compared with sec 32 Transfer of Property Act

on 123 < of

136

matter to go over

Result of legatee ren dering impossible or in definitely postponing act for which no time speci fied and on non perform ance of which subject

Where a bequest is made with a condition super-

added that, unless the legatee shall perform a certain act, the subjectmatter of the bequest shall go to another person, or the bequest shall cease to have effect, but no time is specified for the performance of the act, if the

legatee takes any step which renders impossible or indefinitely postpones the performance of the act required, the legacy shall go as if the legatee had died without performing such act

#### Illustrations

(1) A bequest is made to A with a proviso that unless he enters the Army the legacy shall go over to B A takes Holy Orders and thereby renders it impossible that he should fulfil the condition B is entitled to receive the legacy (1) A bequest is made to A with a proviso that it shall cease to have any effect if he does not marry Bs daughter A marries a stranger and thereby indefinitely postpones the fulfilment of the condition. The bequest ceases to have effect

159 This section applies to Hindus Buddhists etc see Sec 57 and Sch III It may be compared with sec 33 of the Transfer of Property Act

A will ran as follows - Upon the death of my wife my daughter's son N should he live in my house will be entitled to my properties and then followed a gift over in case N did not live in the hou e. After the death of the testator N lived for some time in the house with the widow and then joined with the widow in executing a conveyance of the house. Held that the resi dence required by the will was residence after the interest conferred became an estate in pos ession and that the condition as to residence was not satisfied by N living in the house during the lifetime of the widow when the estate did not vest in him in possession and since N never lived in the house after the widow's death a he had rendered the condition of residence impossible of per formance by joining with the widow in elling the house to a stranger he was deprived of the interest given him by the will-Shyama Charan v Sarub Chandra 17 CW N 39 (41) 14 IC 708.

Illustration (11) does not harmonise with the English law Under that law the indefinite postponement of the fulfilment of a condition does not work as a forfeiture of the estate. Thus in a case similar to that in illustration (ii) it was held that inspite of the girl marrying into another family the performance of the condition was not rendered impossible since she might survive her first husband and she would not be divested because the performance of the condition was still possible during her whole life-Randall v Payne 1 Br C C 55 Lester v Garland 15 Ves 248 Jarman on Wills Vol II p 3

Performance of conda tion precedent or subse quent within specified time Further time in

Where the will requires an act to be performed Section 12by the legatee within a specified time, Act X of either as a condition to be fulfilled before the legacy is enjoyed, or as a con-

dition upon the non-fulfilment of which the subject-matter of the bequest is to go over to another person or the bequest is to cease to have effect, the act must he performed within the time specified, unless the performance of it be prevented by fraud, in which case such further time shall be allowed as shall be requisite to make up for the delay caused by such fraud

This section applies to Hindus Buddhists etc. see Sec. 57 and Sch. III. It may be compared with sec 34 Transfer of Property Act

Specified time .- The observance of the time mentioned in the condition may in any case be material to the due performance of it as where the condition is that the legatee shall return to England within a time specified by the testator and personally apply for his legacy-Tulk v Houlditch 1 Ves & Beam 248 Even the fact that the legatee was ignorant of the death of the testator until a short time before would not excuse him and he would forfeit the legacy if the condition was not performed within the specified time-Haukes v Baldum 9 Sim 355. In some other En lish cases it has been held however that where a condition requires the legatee to perform an act within a certain time the legatee will be entitled to the legacy if he performs the act within a reasonable time though not within the specified time. See Taylor v. Pobham (1782) 1 Bro C C 168 Simpson v Vickers (1807) 14 Ves. 341 (348) Re Packard [1920] 1 Ch 596 Paine v Hyde (1842) 4 Beav 468 Wilkins v Knipe (1832) 5 Beav 273

161 Fraud -The provision of this section allowing further time in case of fraud is based on the broad principle that no man is allowed to take advantage of his own wrong and that relief is given to the party to whose interest it is that the condition should be fulfilled. See Educards v. Aberayron Mutual Insurance Society 1 Q B D 563 Where the performance of a condition is rendered impossible by the fraud of a person equity considers that as done which would have been done and the person guilty of fraud is precluded from taking advantage of it-Rooper v Lane 6 H L C 443

on 125

X of

# CHAPTER XII

# Of Broulsts with Directions as to Application or Enjoyment

Direction that fund be employed in particular manner following absolute bequest of same to or

for benefit of any person

Where a fund is bequeathed absolutely to or for the benefit of any person, but the will contains a direction that it shall be applied or enjoyed in a particular sample or enjoyed in a particular sample or enjoyed in a particular sample. The control of the will be added to receive the fund as if the will had

contained no such direction

#### Illustration

A sum of money is bequeathed towards purchasing a country residence for A or to purchase an annuity for A or to place A in any business. A chooses to receive the legacy in money. He is entitled to do so

Note —This section applies to Hindus Buddhists etc. see Sec 57 and Sh III. It may be compared with ecs 10 and 11 of the Transfer of Property Act.

Principle -- Where there is a bequest of money to or in trust for legatees absolutely but with a direction for the enjoyment or application of the money in a particular mode for their benefit as where it is given to purchase an annuity for the legatees or towards purchasing a country residence the legatees will be entitled to receive the capital money immediately regardless of the particular modes directed for the enjoyment or application-Williams on Executors (11th Edn.) p. 1033 Re lahnston [1894] 3 Ch. 204 Re Marshall [1914] 1 Ch. 192. Notwithstanding the general principle that a donee or a legatee can only take what is given him on the terms on which it is given yet there is a remarkable exception to this general principle. Conditions which are repugnant to the estate to which they are annexed are absolutely void and may consequently be disregarded -per Lindley LJ in Harbin v Masterman [1894] 2 Ch 184 (186) Where there are clear dispositive words in a will creating an absolute estate of inheritance in the legatee any clause in the will attempting to impo e repugnant conditions upon the estate so created is void-Raghungth v Deputy Commissioner 4 Luck 483 (PC) AIR 1929 PC 283 (286) 120 IC 641

But in order to make thus section applicable it must be clear that the fund (re the estate of the testator) is bequeathed absolutely. The word absolutely qualifies not only the first part siz the word bequeathed but also the latter part consisting of the words for the benefit of any person. In other words the opening part of the section should be read thus. Where a fund is bequeathed absolutely to or absolutely for the benefit of any person etc. It follows therefore that a restraint upon alienation airs so only when the property is absolutely bequeathed and by implication there would be no such restraint where there is a demise not of an absolute interest but merely of a temporary or hie interest—hedar Nath v. Gaja Nath 52 CLJ 165 AIR. 1930 Cal 731 (732) 129 IC 846

Intention of testator —In a case in which the testator has devised what is on the face of it an absolute estate and has ubsequently added a clause, which

has the appearance of reducing the powers of an owner of 12 counte estate. it is necessary to decide what were his real intentions. If he means is great an absolute estate he cannot reduce the powers of the grade and an attempt to reduce those powers will be repelled on the grounds of the reprintary of the restraint. But if on the other hand it appears that an his memor has been directed towards restriction at will have to be held, if the restriction is good that the estate is not absolute. In a case of the return the small minute of the testator should be sought from the words of he docter, man a mind the circumstances in which it has been prepared where he comme has been prepared by persons un-killed in conveyances the account south follow the meaning of the words as found to be mean be as a series it is found that the testator had intended to give a manufe min and and attempted to limit the rights of the holder owing a married with a married and a married with the rights of the holder owing a married with the rights of the rights powers so to limit those rights, the attempt a im me and and rejected on the ground of repugnancy-Jagwokes v Same 3 22 4 OWN 1125 106 IC 593 A.I.R. 1928 Oct.

Restraint on altenation -II an estate is de a ----any subsequent clause of the will against a series a series and be regarded as void being repugnant to be see - -684 (692) (PC); Rojomojee : Tronices M = 3 7 7 7 7 7 7 Nath , Chunder Nath 8 Cal 378 (27) East - - - - -and his heirs for ever but wild 2 among and his heirs for ever but heirs alienated the village, it will the a to the first that the condition was begind at the and a condition was begind at the and that the devisee would not a second of the second of t AWN 104 Kamus Chamas and and the same as members of the family with a production - 200 2 200 2 200 9 hable for the debts of art man and a series of the and have the rights of get and an and and any and approximately approximately and approximately Assitosh , Doorga Care : 2 2 2 Language Language . 1/m

Even where a brace and the second of the sec

-Re Rosher 26 Ch D 801 So where a testator devised a house absolutely to the children of his daughter and in a subsequent clause in the will directed that the same should not be sold until the youngest grandchild attained 18 it was held that this was an absolute gift which was not to be controlled by the direction which followed this direction must be regarded merely as an expression of the wish of the testator and must be considered as repugnant under this section- Administrator General v. Money 15 Mad 448 (472): Umrao v. Baldeo 14 Lah 33 143 I C 615 A I R 1933 Lah 201 (202 203) Nauglrai v Ghulam 95 I C 346 A I R 1926 Sind 261 (263) Where a testator provided by his will that his sons should become the owners and possessors of certain property and directed that his wife should manage the same during her life time and that the locators should not alienate the estate for her life time held that the estate that passed to the sons was an absolute one that the right of management of the widow was not such an interest as to postpone the making over of the corpus of the estate to the legatees and that the condition as to alienation was void-Ram haur v Atma Singh 8 Lah 181 103 IC 506 AIR 1927 Lah 404 (408)

A provision in a will permitting the legate to sell the property only to a particular person or persons is void. Thus a testator gave an estate to A to become his property on attaining the age of 25 years with an injunction never to ell it out of the family but if sold at all it must be to one of the brothers hereinafter named. Held that the restriction was inoperative. It is obvious that if the introduction of one person's name as the only person to whom the property may be sold renders such a proviso valid a restraint on alienation may be created as complete and perfect as if no person whatever was named inasmuch as the name of a person who alone is permitted to purchase might be so selected as to render it reasonably certain that he would not buy the property and that the property would not be alienated at all—Attuater 8 Beas 330.

But where a testator gave a property to his wife giving her permission to sell it but provided that before selling the property to a stranger she should give an opportunity to the testator's heirs and to sharers to purchase it at an adequate price it was held that such a condition was not a restraint on alienation and was valid nor did it limit the absolute gift to the widow to a mere life estate—Sudhamani v Surat Lal 28 CWN 541 (544) (PC) 73 IC 530 AIR 1923 PC 55

Restraint on partition -A condition in restraint of partition is void Thus a provision in a will or gift giving property absolutely to some persons but directing that they shall not divide the property for a certain length of time (e.g. twenty years) is yord. The donees may proceed to partition at once-Mokoondo v Ganesh 1 Cal 104 Rajendra v Sham Chand 6 Cal 106 Abu Mohammad v Kans Fiz a 28 All 185 Hemangini v Nobin Chand 8 Cal 788 (801) Cally Nath v Chunder Nath 8 Cal 378 (387) A clause in a will to the effect that division of the testator's estate will not be made till his sons come of are and earn their livelihood and all the daughters are married is inoperative both on the ground of the repugnancy of the gift made and on the ground of uncertainty because the events mentioned above (1sz marriage of the daughters and the actual earning of livelihood by the sons) might either not take place at all or be indefinitely postponed-J N Ghose v B B Dass AIR 1922 Cal 302 (305) 70 I C 638 Where there is a direction in a will implying a post ponement of the division of the residue for ten years or until the death of the last surviving son that direction is inoperative, the interest to which it attaches

being absolute—Putlibas v Sorabji 25 Bom L.R. 1099 (P.C.) AIR 1923 P.C. 122 (127)

Other restrictions -A condition postponing enjoyment of the property is void. Where a tes ator intends to make a present gift of his property to his on (a major) but he intends also that his son should have the ultimate enjoy r cut of the whole estate in the hands of the trustees after the payment of the luracies the deprivation of the son of the present enjoyment of the estate and th attempted restriction therein are invalid and must be disregarded-Lloyd v Webb 24 Cal 44 (51) Where a Hindu testator made a sufficiently clear gift of his property to his grandsons living at his death, but endeavoured to postpone the possessory enjoyment of his grandsons to a period of five years and directed the accumulation of the profits of his estate for a very much longer period it vas held that the wall containing sufficiently direct words of present gift the clau es postponing the enjoyment in possession and directing accumulation must be rejected or disregarded as inconsistent or repugnant -Cally Nath v Chunder Nath 8 Cal 378 (387) The principle of the Court has always been to recognize the right of all persons who attain the age of majority to enter upon the absolute use and enjoyment of the property given to them by a will notwith standing any directions by the testator to the effect that they are not to enjoy it until a later age unless during the interval the property is given for the benefit of another. If the property is once theirs it is useless for the testator to impose any fetter upon their enjoyment of it in full so soon as they attain the age of majority-Gosling v Gosling (1859) Johns 265 (272) Husenbhoy v Ahmedbhos 26 Bom 319 (322 323)

Direction that mode of enjoyment of absolute bequest is to be restrict ed to secure specified benefit for legatee

. 139 أسد

Where a testator absolutely bequeaths a fund, so Section 126
as to sever it from his own estate, but Act X of
directs that the mode of enjoyment of
the type of the legatee shall be restricted so as
to secure a specified
to secure a specified benefit for the

legatee, if that benefit cannot be obtained for the legatee, the fund belongs to him as if the will had contained no such direction.

#### Illustrations

(t) A bequeaths the residue of his property to be divided equally among daughters and directs that the shares of the daughters shall be settled upon themselves respectively for the and be paid to their children after their death All the daughters die unmarried. The representatives of each daughter are entitled to her share of the residue

(ii) A directs his trustees to raise a sum of money for his daughter and he then directs that they shall nivest the fund and pay the income arising from it to her during her life and divide the principal among her children after her death. The daughter dies without having ever had a child. Her representatives are entitled to the fund.

are entraces to the full

163 This section applies to Hindus Buddhists etc. see Sec 57 and Sch III

This section and section 140 (which is supplementary to the present section) together enact in India the rule in Lassence v Tierney (1849) 1 Mac & G 551 the former section laying down what may be called the positive branch of it and the latter section the negative branch—Soundararajan v Natarajan 14 Mad 446 (478)

-Re Rosher 26 Ch D 801 So where a testator devised a house absolutely to the children of his daughter and in a subsequent clause in the will directed that the same should not be sold until the youngest grandchild attained 18 it was held that this was an absolute gift which was not to be controlled by the direction which followed this direction must be regarded merely as an expression of the wish of the testator and must be considered as repugnant under this section-Administrator General v Money 15 Mad 448 (472) Umrao v Baldeo 14 Lah 353 143 I C 615 A I R 1933 Lah 201 (202 203) Nawatras v Ghulam 96 I C 346 A I R 1926 Sind 261 (263) Where a testator provided by his will that his sons should become the owners and possessors of certain property and directed that his wife should manage the same during her life time and that the legatees should not alienate the estate for her life time held that the estate that passed to the one was an absolute one that the right of management of the widow was not such an interest as to postpone the making over of the corpus of the estate to the legatees and that the condition as to alienation was void-Ram Kaur v Atma Singh 8 Lah 181 103 IC 506 AIR 1927 Lah 404 (408)

A provision in a will permitting the legate to sell the property only to a particular person or persons is void Thus a testator gave an estate to A to become his property on attaining the age of 25 years with an injunction never to sell it out of the family but if sold at all it must be to one of the brothers hereinafter named Held that the restriction was noperative I is obvious that if the introduction of one person s name as the only person to whom the property may be sold renders such a proviso valid a restraint on altenation may be created as complete and perfect as if no person whatever was named inasmuch as the name of a person who alone is permitted to purchase might be so selected as to render it reasonably certain that he would not buy the property and that the property would not be alienated at all—Attuater 18 Beas 330

But where a testator gave a property to his wife giving her permission to sell it but provided that before selling the property to a stranger she should give an opportunity to the testator's heirs and co sharers to purchase it at an adequate price it was held that such a condition was not a restraint on altenation and was valid nor did it limit the absolute gift to the widow to a mere fife estate —Sudhamani v Surat Lal 28 CWN 541 (544) (PC) 73 IC 530 AIR 1023 PC 65

Restraint on partition -A condition in restraint of partition is void Thus a provision in a will or gift giving property absolutely to some persons but directing that they shall not divide the property for a certain length of time (e g twenty years) is void. The donces may proceed to partition at once-Mokoondo v Ganesh 1 Cal 104 Rajendia v Sham Chand 6 Cal 106 Abu Mohammad v Aantz Fizza 28 All 185 Hemangint v Nobin Chand 8 Cal 788 (801) Cally Nath v Chunder Nath 8 Cal 378 (387) A clause in a will to the effect that drusson of the testator's estate will not be made till his sons come of age and earn their livelihood and all the daughters are married is inoperative both on the ground of the repugnancy of the gift made and on the ground of uncertainty because the events mentioned above (112 marriage of the daughters and the actual earning of livelihood by the sons) might either not take place at all or be indefinitely postponed-J N Ghase v B B Dast A I R 1922 Cal. 302 (305) 70 JC 638 Where there is a direction in a will implying a post ponement of the division of the residue for ten years or until the death of the last surviving son that direction is inoperative the interest to which it attaches

bung absolute—Puthbar v Sorabji 25 Bom L R 1099 (PC) A I R 1923 PC 122 (127)

Other restrictions -A condition postponing enjoyment of the property is void. Where a tes ator intends to make a present gift of his property to his on (a rajor) but he intends also that his son should have the ultimate enjoy rent of the vhole estate in the hands of the trustees after the payment of the I gacies the deprivation of the on of the present enjoyment of the estate and th attempted restriction therein are invalid and must be disregarded-Lloyd v 1'cbb 24 Cal 44 (51) Where a Hindu testator made a sufficiently clear gift of his property to his grandsons living at his death, but endeavoured to postpone the possessory enjoyment of his grandsons to a period of five years and directed the accumulation of the profits of his estate for a very much longer period it vas held that the will containing sufficiently direct words of present gift the clauses postponing the enjoyment in possession and directing accumulation must be rejected or disregarded as inconsistent or repugnant-Cally Nath v Chunder Nath 8 Cal 378 (387) The principle of the Court has always been to recognize the right of all persons who attain the age of majority to enter upon the absolute use and enjoyment of the property given to them by a will notwith standing any directions by the testator to the effect that they are not to enjoy it until a later age unless during the interval the property is given for the benefit of another. If the property is once theirs it is useless for the testator to impose any fetter upon their enjoyment of it in full so soon as they attain the age of majority-Gosling v Gosling (1809) Johns, 265 (272) Husenbhoy v Ahmedbhoy 26 Bom 319 (322 323)

Where a testator absolutely bequeaths a fund, so Section 12

Direction that mode of enjoyment of absolute bequest is to be restrict ed to secure specified benefit for legatee as to sever it from his own estate, but Act X of directs that the mode of enjoyment of it by the legatee shall be restricted so as to secure a specified benefit for the legatee, if that benefit cannot be

obtained for the legatee, the fund belongs to him as if the will had contained no such direction

### Illustrations

(1) A bequeaths the residue of his property to be divided equally among his daughters and directs that the shares of the daughters shall be settled upon themselves respectively for life and be paid to their children after their death All the daughters die unmarined. The representatives of each daughter are entitled to her share of the residue.

(n) A directs his trustees to raise a s.im of money for his daughter and he then directs that they shall invest the fund and pay the income arising from it to her during her life and divide the principal among her children after her death. The daughter dies without having ever had a child. Her representatives

are entitled to the fund

163 This section applies to Hindus Buddhists etc. see Sec. 57 and Sch. III.

This section and section 140 (which is supplementary to the present section) together enact in India the rule in Lassence v Trerney (1849) 1 Mac & 6 551 the former section laying down what may be called the positive branch of it and the latter section the negative branch—Soundararajan v Natarajan 44 Mad 446 (478)

164 Principle—If the testator leaves a legacy absolutely as rigards hus estate but restricts the mode of the legatee's emolyment of it to secure certain objects, for the benefit of the legatee then upon failure of such objects the absolute gift privals if the intention of the testator as collected from the will as a whole is not against such absolute gift—Administrator General v. Apear 3 Cal 5-33 (556) Compbell v Browning 1 Phill 301 For in riy opinion it is settled law that if you find an absolute gift to a legatee in the first instance and trusts are engrafted or imposed on that absolute interest which fail either from lapse or invalidity or any other reason then the absolute gift takes effect so far as the trusts have failed to the exclusion of the residuary legatee or the next of lan as the case may be—per Lord Davey in Hancack v. Watson [1902] AC 14 (22). Where the entire fund or the entire interest of a fund is given for a particular purpose which fails the Court holds the donce to be entitled to the whole fund treating the purpose merely as the motive for the gift—Re Sanderson's Trusts 3 k. & J. 457

The principle applies where the logacy is bequeathed in trust for the legatee and not directly to the legatee himself -Re Harrison [1918] 2 Ch 59

Cases -Where a testator bequeathed certain manuscript books to trusters for his grandson and directed there to publish the books and pro ide a fund to assist him when he goes to college and all o bequeathed £1 000 towards the printing and it is as impossible to publish the books at a profit held that the grandson was entitled to the £1 000 as the primary intention of the testator was to benefit the legatee-Re Skinner's Trusts 1 J & H 102 Where a testator gave legacies to his grandsons and declared that they should be held on trust to invest the same and apply the income during the minority of the legatee towards his maintenance and education and upon his attaining 21 to pay the income during his life and after his death to pay it to his widow and after the death of them both to transfer the capital to the child or children of such grandson as should attain 21 and there wa also a clause of survivorship held that the cufts to the grandson were absolute and that the subsequent provisions were simply a qualification of the gifts for the benefit of the legatees and that upon the death of one of the grand one unmarried his legal representative was entitled to the legacy left for him-Administrator General v Aprar 3 Cal 553 (556) A testatrix begueathed the sale proceeds of her property to her two sons S and J and directed the executors to hold Js shares in trust to apply the income thereof to Js muntenance and if he should die leaving a widow or assue his share was to go to them as he should bequeath and that if J should reform himself the executors in their discretion were to make over to J for his absolute use the whole or part of his share of the property as they thought proper Held that there vas an absolute gift to J and there was a gift over to the widow or issue of J and to that extent the absolute gift to J was qualified Should the gift over fail the ab olute gift to J would remain unimpaired according to the provisions of this section-Bechar Akha v P De Cruz 19 Bom 770 (774) on appeal from 19 Bom 221

A testator after directing by his will the formation of a fund for the payment of a monthly sum to his widow during her life provided that the residuary trust funds are vested in trustees in trust to apportion the fund into as many equal shares as there may be daughters of mine living at the time of my decease or who having predeceased shall have left issues and to pay the income of each equal hare to my .and daughters respectively during their lives and thereafter to stand po se.sed of the share in trust for all the children of the deceased daughter who shall attain the age of 21 in equal shares etc. Only

some of the grandchildren were born before the testator died. Held that this section did not apply because on a true construction of the provisions of the will there was no intention to confer an absolute estate on the daughters but the interest of each daughter was confined to an income for life. Consequently there would be an intestacy after the termination of the life estate of the daughters—Soundararajan × Natarajan 48 Mad 903 (PC) 19 MLJ 836 ATR 1925 PC 244 overruling Soundararajan v Natarajan 44 Mad 446 (465)

- 140 Where a testator does not absolutely bequeath Section 127
Bequest of fund for a fund, so as to sever it from his own 1855

cstate, but gives it for certain purposes, and part of those purposes cannot be fulfilled, the fund, or so much of it as his not been exhausted upon the objects contemplated by the will, remains a part of the estate of the testator

### Illustrations

(i) A directs that his trustees shall invest a sum of money in a particular way and shall pay the interest to his son for life and at his death shall divide the principal among his children. The son dies without having ever had a child The fund after the son's death belongs to the estate of the testator (ii) A bequeats the residue of his estate to be divided equally among his

(ii) A bequeaths the residue of his estate to be divided equally among his daughters with a direction that they are to have the interest only during their lives and that at their decease the fund shall go to their children. The daughters have no children. The fund belongs to the estate of the testator.

166 This section applies to Hindus Buddhists etc see Sec 57 and Sch III If there is no absolute gift as between the legatee and the estate but particular modes of enjoyment are prescribed and those modes of enjoyment fail the legacy forms part of the testators estate as not having in such event been given away from 11—Lossence v Terney 1 Mag. & G 551 (561 562)

# CHAPTER VIII

# O1 BEQUESTS TO AN EXECUTOR

Legatee named as executor cannot take un less he shows intention to act as executor

If a legacy is bequeathed to a person who is Section 128 named as not take um not take the legacy unless he proves the sis intention will or otherwise manifests an intention to act as executor

#### Illustration

A legacy is given to A who is named an executor A orders the funeral according to the directions contained in the will and dies a few days after the testator without having proved the will. A has manifested an intention to act as executor.

Note —This section applies to Hindus Buddhists etc. see Sec 57 and Sch III

167 Principle —Where legacies are given to persons in the character of executors, and not as marks of personal regard only such bequests are considered to have been given upon an implied condition ziz that those persons clothe themselves with the character in respect of which the benefits were intended for them—Abbot v. Massic 3 Ves. 118 Freeman v. Fantee 3 Mer 31, Hansion v. houley 1 Ves. 216

Difference between English and Indian Law -There is a difference between the Linglish and the Indian law on this subject. According to the Lucisde law when a legacy is given to a person appointed executor the presumption is that it is given to him in that character but this presumption is rebutted if it should appear either from the language of the bequest or from the fair construction of the whole will that the bequest to a person who is named executor is given to him independently of that character and then the legatee will be entitled to receive the legacy whether he accepts the office or not. Thus where the testator as an encouragement to his executors to accept the trust and exe cutorship cave to each of them £10 for mourning and a ring as well as £15 a year for their trouble it was held that though they should not get the annuity of £15 till they accepted office yet they were entitled to £10 for mourning and the ring even though they did not accept the office because these were intended for them immediately and not to wait for their time of acceptance-Humberston v Humberston 1 P Wms 333 So also the fact of a legacy being payable to a legatee (who is named as one of the executors) after the death of a tenant for life rebuts the presumption that the legacy was given to him in his character of executor-Re Reeves Trust 4 Ch D 841

But no such presimption anses in Indian law The language of this section is plain and it lays down that where a legacy is given to a person who is named as executor whether it is given to him in his character of executor (if a as a remuneration for his care and trouble) or independently of it he cannot claim the legacy unless he accepts office Section 128 (if a the present section) leaves no room for a presumption. The language is peremptory it is not left to the Court to decide whether the legacy was given to the person named in his character as executor. It is assumed that it was so given and the prohibition follows—per Macpherson J in Presonuo v Administrator General. 15 Cal. 83 (87).

This section implies that the executor survives the testator and cannot apply to a case where he predeceases the testator. Thus a testative executed a will giving a legacy to her son and appointing the son as executor. The son predeceased his mother leaving a son behind Held that as this section is absolute and applies only if the son survived and refused to act as executor it could not apply to the present case and the legacy in favour of the son of the testative dut not lopse on account of his predecease and consequent inability to act as executor but enured for the benefit of the grandson of the testative by operation of sec. 109—Ramasamy \( \text{ habbusam} \) at M. I. 35.

168 Proves the will, etc.—If the legatee proves the will with an intention to act under it that will be a sufficient performance of the condition or if he unequivocally mainfests an intention to act in the executorship as by giving directions about the funeral of the testator and is prevented by death from further entering upon his office that will all o be a performance of the condition—Williams on Executors (11th Edn.) p 1030. Thus where one of the executors survived the testatrix is short a time that he was prevented from joining with his co executors in proving her will but he concurred with them in gring directions respecting her funeral and in paying certain sums for

burial fees etc in consequence of tho e directions it was held that he was entitled to the legacy-Harrison v Rowley 4 Ves 212 A trustee dying 19 months after the testatrix without having acted was held entitled to the legacy given as a token of reward and a recompense for his trouble no refusal or neglect to act appearing-Bradges v Wolton 1 Ves 134 Where a testator gave a legacy to an executor and the latter manifested an intention to act by making arrangements for the testator's funeral and sradh and by advancing money for these purposes and was always ready and willing to act but could not do so on account of disagreement with his co executive who was trying to harass him when he intended to take out probate of the vil as a result of which he could not take out probate held that he was entitled to the legacy-Prosonno v Administrator General 15 Cal 83 (89)

# CHAPTER XIV

# Or Specific Legacies

142 Where a testator bequeaths to any person a Section I specified part of his property, which Act X of Specified legacy defined is distinguished from all other parts of his property, the legacy is said to be specific

#### Illustrations

(1) A bequeaths to B-

the diamond ring presented to me by C

my gold chain a certain bale of wool

a certain piece of cloth

all my household goods which shall be in or about my dwelling house in M Street in Calcutta at the time of my death

the sum of 1 000 rupees in a certain chest the debt which B owes me

all my bills bonds and securities belonging to me lying in my lodgings in Calcutta

all my furniture in my house in Calcutta all my goods on board a certain ship now ly ng in the river Hughli

2000 rupees which I have in hands of C the money due to me on the bond of D

my mortgage on the Rampur factory

one half of the money owing to me on my mortgage of Rampur

1 000 rupees being part of a debt due to me from C

my capital stock of 1 0001 in East India Stock my promissory notes of the Government of India for 10 000 rupces in their 4 per cent, loan

all such sums of money as my executors may after my death receive in respect of the debt due to me from the insolvent firm of D and Company

all the wine which I may have in my cellar at the time of my death such of my horses as B may select

all my shares in the Imperial Bank of India
all my shares in the Imperial Bank of India
all my shares in the Imperial Bank of India which I may possess
at the time of my death

all the money which I have in 51/2 per cent, loan of the Govern ment of India

all the Government securities I shall be entitled to at the time of m) decease

Lach of these le acies is specific

(at) A having Covernment promissory notes for 10 000 rupces, bequeath to his executors Covernment promisions notes for 10 000 supers in trust to sell for the benefit of B The legacy 15 specific

(iii) A having property at Benares, and also in other places, bequeaths to

B all his property at Benates. The legacy is specific.

(m) A bequeaths to B-

his house in Calcutta

his zamindari of Rampur

his talug of Ramna, at his lease of the indigo-factory of Salkya

an annuity of 500 rapees out of the rents of his zamindari of W. A directs his zamindari of \ to be sold and the proceeds to be invested for the benefit of B

Each of these bequests is specific

(1) \ by his will charges his zamindari of Y with an annuity of 1 000 rupees to C during his life and subject to this charge he bequeaths the zamindan to D Lach of these bequests is specific

A bequeaths a sum of money-

to buy a house in Calcutta for B

to buy an estate in zilla Faridpur for B

to buy a diamond ring for B

to buy a horse for B

to be invested in shares in the Imperial Bank of India for B

to be invested in Government securities for B

A bequeaths to B-

a diamond ring

a horse 10 000 rupees worth of Government securities

an annuity of 500 rupees

2 000 rupees to be paid in cash

so much money as will produce 5 000 rupees four per cent. Govern

ment securities.

These bequests are not specific (vii) A having property in England and property in India bequeaths a legacy to B and directs that it shall be paid out of the property which he may leave in India He also bequeaths a legacy to C and directs that it shall be paid out of property which he may leave in England No one of these legacies. is specific

Note -The whole of this chapter (secs 142-149) applies to Hindus Buddhists etc see sec 57 and Sch III

Specific legacy -A legacy is general when it is so given as not to amount to a bequest of a particular thing or money of the testator distin cuished from all others of the same kind. A legacy is specific when it is a bequest of a specified part of the testator's personal estate which is so distin guished-Williams on Executors 11th Edn p 915 But the fact that a specific legacy is given or a specific part of the personalty is excepted out of a general residue does not male a gift of that general residue specific-Re Quey (1882) 20 Ch D 676 A specific legacy is in the first place a part of the testator's property in the next place it must be a part emphatically as distinguished from the whole it must be what has been sometimes called a severed or distinguished part it mut not be the whole in the meaning of being the totality of the testator's property or the totality of the residue of his property after having given legacies out of it. If it satisfies both conditions that it is a part of the testator's property itself and is a part as distinguished from the whole or from the whole of the residue then it appears to me to satisfy everything that is required to treat it as a specific legacy -per Jessel MR in Bathamley v Sherson LR 20 Eq 304 (308 309) A specific legacy is

something which a testator identifying it by a sufficient description and manifesting an intention that it should be enjoyed in the state and condition indicated by that description separates in favour of a particular legatee from the g neral mass of his personal estate-Robertson v Broadbent 8 App Cas 812

The Courts in general are averse to construing legacies to be specific and the intention of the testator with reference to the thing bequeathed must be clear-Ellis v Walker Ambl 310 Kurby v Potter 4 Ves 748 Webster v Hale 8 Ves 413 Sayer v Sayer 7 Hare 377 Legacies though in fact specific may be treated by the testator as general legacies and in that case they will be treated as general legacies for the purpose of administration-Re Compton [1914] 2 Ch 119

A bequest to a legatee of a garden and a bungalow out of the moveable and immoveable properties of the testator is a specific bequest-Julia Fernandez V Severing Coelho 20 L W 748 AIR 1925 Mad 418 (420) 84 IC 1029 The bequest of a definite rent charge or annual sum is a specific bequest. But a bequest of a rent producing property on trust the trustees to apply the rents and profits for the benefit of a legatee is not a specific bequest because the legatee will not necessarily obtain a specific (se a fixed and named) annual sum as the rents and profits are hable to fluctuate from year to year-Bas Bhikaiji v Bas Dinbas 13 Bom L R 319 11 I C 350 The testator directed by his will that after the amount due in respect of lands sold under oral agree ments has been received a sum of Rs 10000 should be paid to his wife and a sum of Rs 4000 to his daughter it was held that the legacies were not specific but demonstrative (sec 150)-Rajanikant v Kiko 34 Bom L R 1124 140 I C 206 A I R 1932 Born, 506 (507)

Bequest of certain sum where stocks etc which invsted are described

143 Where a certain sum is bequeathed, the legacy Section 130 is not specific merely because the stock, Act X of funds or securities in which it is in- 1865 vested are described in the will

### Illustration

A bequeaths to B-

10 000 rupees of my funded property

10 000 rupees of my property now invested in shares of the East India Railway Company

10 000 rupees at present secured by mortgage of Rampur factory

No one of these legacies is specific

where testator had at date of will equal or greater amount of stock

144 Where a bequest is made in general terms of a Section 131 Bequest of stock certain amount of any kind of stock, Act vol the legacy is not specific merely be- 1865 cause the testator was, at the date of his will, possessed of stock of the

specified kind, to an equal or greater amount than the amount bequeathed

# Illustration

A bequeaths to B 5000 rupees five per cent. Government securities. A had at the date of the will five per cent. Government securities for 5000 rupee The legacy is not specific

Section 132 Act ∖ of 1865 145 A money legacy is not specific increly because the will directs its payment to be post-

of the testator has been reduced to a

certain form, or remitted to a certain

Bequest of money where not payable until part of testator's property disposed of in certain way

Illustration

place

A bequeaths to B 10 000 rupees and directs that this legacy shall be paid as soon as A's property in India shall be realised in England The legacy is not specific

Section 133 Act X of 1865 When enumerated articles not deemed speu ficially bequeathed articles enumerated articles enumerated bequeathed shall not be deemed to be specifically

170 Principle —The principle of this section is that where there is a gift of a residue and the testator unnecessarily chooses to enumerate some particular things in that residuary bequest such a circumstance is not sufficient to constitute the things so enumerated a specific gift—Fielding v Preston 1 DeG & J 488

The word articles refers to moveable and not to immoveable properties— Julia Fernandez v Severina Coelho 20 LW 748 AIR 1925 Mad 418 (420) 84 IC 1029

Section 134 Act X of 1865 Retention in form of specific bequest to several persons in succession, it shall be retained in the form in which the testator left it, although it may be of such a nature that its value is continually decreasing

Illustrations

(1) A having lease of a house for a term of years fifteen of which were unexpired at the time of his death has bequeathed the lease to B for his life and after B s death to C B is to enjoy the property as A left it although if B lives for fifteen years. C can take nothing under the bequest to C for his finish having any control of the fifteen that to C for his finish and after Cs death to D C is to enjoy the annutly as A left it although if B dies before D D can take nothing under the bequest

Section 135 Act X of 1865

Sale and investment of proceeds of property be queathed to two or more persons in succession

148

Where property comprised in a bequest to two strength of more persons in succession is not specifically bequeathed, it shall, in the observe of any direction to the con-

trary be sold, and the proceeds of the sale shall be invested in such securities as the High Court may by any general rule authorize or direct, and the fund

thus constituted shall be enjoyed by the successive legatees according to the terms of the will

# Illustration

A having a lease for a term of years bequeaths all his property to B for life and after Bs death to C. The lease must be sold the proceeds invested as stated in this section and the annual mome arising from the fund is to be paid to B for life. At Bs death the capital of the fund is to be paid to C.

Where deficiency of assets to pay legacies specific legacy not to abate with general le gacies.

149 If there is a deficiency of Section 136 assets to pay legacies, a specific legacy Act of is not liable to abate with the general legacies

For abatement of general and specific legacies see secs 327 328 and 330

# CHAPTER XV

# OI DI MONSTRATIVL LEGACILS

150 Where a testator bequeaths a certain sum of Section 137 Demonstrative legacy money, or a certain quantity of any Act A of defined other commodity, and refers to a particular fund or stock so as to constitute the same the primary fund or stock out of which payment is to be made, the legacy is said to be demonstrative

Explanation —The distinction between a specific legacy and a demonstrative legacy consists in this, that-

> where specified property is given to the legatee, the legacy is specific.

> where the legacy is directed to be paid out of specified property, it is demonstrative

#### Illustrations

- (a) A bequeaths to B 1000 rupees being part of a debt due to him from W. He also becaush so C 1000 rupees to be paid out of the debt due to him from W. The legacy to B is specific the legacy to C is demonstrative. (11) A bequeaths to B
  - ten bushels of the corn which shall grow in my field of Green Acre 80 chests of the indigo which shall be made at my factory of

    - No chests of the indigo which shall be made at my indicory of Rampur at my indicory of 10000 rupees out of my five per cent. promissory notes of the an annuary of 500 rupees from my funded property 1000 rupees out of the sum of 2000 rupees due to me by C an annuary and directs it to be paid out of the rents arising from my taluk of Ramnagar

(m) A bequeaths to B-

10 000 rupees out of my estate at Ramnagar or charges it on he estate at Ramnagar 10 000 rupees being my share of the capital embarked in a certai business

Each of these bequests is demonstrative

Note --- Sections 150 and 151 apply to Hindus Buddhists etc. see Sec 52 and Sch. III

171 Demonstrative legacy —A testator had entered into oral agree method of sale with regard to his lands and then made a will in which he left directions that the lands should be sold and after the mone, was received Rs 10000 was to be paid to his wife and Rs 4000 to his daughter. It was held that these legacies do not refer to the lands which were left by the testator but were legacies with regard to money payments which were to be made out of the sale proceeds of the lands. The legacies were therefore demonstrative and not specific—Rajamikant v Kiho 34 Bom LR 1124 140 IC 206 A IR 1932 Bom 506 (507). Where a testator bequeathed his paghir income to his son providing that his grandsom would receive out of that paghir income Rs 1000 a year held that the annuity bequeathed to the grandson was a demonstrative legacy within the meaning of this section—Bhaguan Das v Ram Das 109 PR 1908 8 IC 909 (910)

Section 138 Act X of 1865 151 Where a portion of the fund is specifically be-

Order of payment when legacy directed to be paid out of fund the subject of specific legacy

queathed and a legacy is directed to be paid out of the same fund, the portion specifically bequeathed shall first be paid to the legatee, and the demons-

trative legacy shall be paid out of the residue of the fund and so far as the residue shall be deficient, out of the general assets of the testator

#### Illustration

A bequeaths to B 1000 rupees being part of a debt due to him from W He also bequeaths to C 1000 rupees to be paid out of the debt due to him from W The debt due to A from W is only 1500 rupees of these 1500 rupees 1000 rupees belong to B and 500 rupees are to be paid to C C is also to recent e 500 rupees out of the general assets of the festator

1.72 A demonstrative legacy is so far general and differs so much in effect from one properly specific that if the fund be called in or fail the legates will not be deprived of his legacy but be permitted to receive it out of the general assets yet the legacy is so far specific that it will not be liable to abate with general legacies upon a deficiency of assets —Williams on Execution 11th Edn p 917 Mann v Copeland 2 Maddock 223 Litesay v Relfern 2 Y & C 90 Demonstrative legacies are in one sense only specific six that against all other general legatees they have a precedence of payment out of the debt or security but in another sense they are general since if the debt be not in custonce at the testators death or if it be insufficient to pay the legacies the legatees will be entitled to autifaction out of the general estate of the testator—Williams, pp 925 926

See also notes under sec. 153

# CHAPTER XVI

# O1 ADLMPTION O1 LIGACIES

152 If anything which has been specifically bequeath- Section 139

Ademption explained does not belong to the testator at the Act X of time of his death, or has been converted time of his death, or has been converted.

into property of a different kind, the legacy is adeemed, that is, it cannot take effect, by reason of the subject-matter having been withdrawn from the operation of the will

# Illustrations

(i) A bequeaths to Bthe diamond ring presented to me by C

my gold chain

a certain bale of wool a certain piece of cloth

all my household goods which shall be in or about my dwelling house in M Street in Calcutta at the time of my death

A in his life time -

sells or gives away the ring converts the chain into a cup converts the wool into cloth makes the cloth into a garment

takes another house into which he removes all his goods

Each of these legacies is adeemed

(ii) A bequeaths to B—
the sum of 1 000 rupees in a certain chest

all the horses in my stable

At the death of A no money is found in the chest and no horses in the

stable. The legacies are addemed

(iii) A bequently to Board in the these and to holes a the

stable. The legacies are addemed

(iii) A bequently to B certain bales of goods. A takes the goods with him

on a voyage. The ship and goods are lost at sea and A is drowned. The

legacy is addemed.

Note —This chapter (secs. 152—166) applies to Hindus Buddhists etc see Sec. 57 and Sch. III

Non ademption of de that the property on which it is charged Act X of by the will does not exist at the time 1865 of the death of the testator, or has been converted into property of a different kind, but it shall in such case be paid out of the general assets of the testator

173 The rule of ademption does not apply to demonstrative legacies re to legacies of so much money with reference to a particular fund for pay ment as for instance legacies given out of a particular stock or debt or term for although the particular fund be not in existence at the testators death the legates will be entitled to satisfaction out of the general estate—Williams on Executors 11th Edn. Vol II p 1062 See notes under sec. 151 So where the testatirx had no power to dispose of the particular fund out of which she directed the payment of the demonstrative legacies they vould be payable out of the general estate of the testatirx—Sahb Mirza v Umda Khanum 19 Cal 444 (452) (PC) So also demonstrative legacies do not fail if the part

THE INDIAN SUCCESSION ACT

cular fund out of which they are directed to be paid though in existence cannot b) reason of some provision of law of which the testator was apparently ignorant, by reason or some provision or taw or which the texacter was appearency remains the first with the first man of the features in questions in such a case they or created with the payment of the general assets—Bhagwan Das v. Ram Das 109 PR. ISEC. 106 1908 1 I C 969 (910)

Section 141 Act \ of 1865

Where the thing specifically bequeathed is the Ademption of specific bequest of right to re right to receive something of value cesse something from from 1 third parts, and the testator third party himself receives it, the bequest is (1) A bequeaths to B\_

the debt which C owes me 2000 rupces which I have in the hands of D the money due to me on the bond of E

the money due to me on the bond of E

Mit these debts are extinguished in A s lifetime some with and some without his consent. All the legacies are adeemed consent All the legaces are adversed

(ii) A bequeaths to B his interest in certain policies of life assurance. A in

his lifetime receives the amounts of the policies. The legacy is adceimed. If a debt specifically bequeathed is received by the testator the legacy

18 addeemed for the subject is extinguished and nothing remains to which the is addensed for the subject is extinguished and nothing remains to which in words of the will can apply—Badnick v. Steelers 3 Bro C C 431 Rider v. words of the win can apply—brance \ Sievens 3 bro C
Wafer 2 P Wms 320 (330) Gardner \ Hatton 6 Sim 93 Ademption pro tanto

Section 142 Act X of 1865

The receipt by the testator of a part of an entire by testators receipt of part of entire thing speci thing specifically bequeathed shall fically bequeathed operate as an ademption of the legacy to the extent of the sum so received

A bequeaths to B the debt due to me by C

The debt amounts to 10 000
by ademption so far as regards the 5 000 rupees one half of the debt. The legacy is revoked A partial recept by the testator of the debt specifically bequesthed will operate as an ademption pro tento see Ashburner v W Charge 2 Bro C C

Section 143 Act X of 1865

If a portion of an entire fund or stock is speci-Ademption pro tanto by testator's receipt of fically bequeathed the receipt by the portion of entire fund of testator of a portion of the fund or which portion has been stock shall operate as an ademption specifically bequeathed only to the extent of the amount so

or stock shall be applicable to the discharge of the specific received and the residue of the fund legacy

A bequestly to B one half of the sum of 10 000 napees due to hun from by the half of the sum of 10 000 napees due to hun from by the sum of the 10 000 napees The 10 000 napee A Dequeaths to B one half of the sum of 10 000 rupees due to him from W to A at the time of his death belong to B under the A of the sum of his death belong to B under the sum of the sum

On.

ber

Per

157 Where a portion of a fund is specifically be-Section 144 Order of payment where portion of fund

specifically bequeathed to one legatee and legacy charged on same fund to testator having received portion of that fund remainder insufficient to pay both

queathed to one legatee, and a legacy 1865 charged on the same fund is bequeathed to another legatee, then, if the testator receives a portion of that fund, and the remainder of the fund is insufficient to pay both the specific and the demonstrative legacy, the specific legacy shall be paid first, and the residue (if any) of the fund shall be applied, so far as it will extend, in payment of the demonstrative legacy and the rest of the de-

monstrative legacy shall be paid out of the general assets of the testator

another and

# Illustration

A bequeaths to B 1000 rupees part of the debt of 2000 rupees due to him from W He also bequeaths to C 1000 rupees to be paid out of the debt due to him from W. A alternards receives 500 rupees, part of that debt and dies leaving only 1500 rupees due to him from W. Of these 1500 rupees 1000 rupees belong to B and 500 rupees are to be paid to C. C is also to receive 500 rupees out of the general assets of the testator

Ademptson where stock specifically bequeathed does not exist at testa tor s death

Where stock which has been Section 145 158 specifically bequeathed does not exist Act X of at the testator's death, the legacy is adeemed

# Illustration

A bequeaths to B-

my capital stock of 1 000l in East India Stock

my promissory notes of the Government of India for 10 000 rupees in their 4 per cent loan A sells the stock and the notes The legacies are adeemed

without the knowledge or sanction of the testator

Ademption pro tanto where stock specifically bequeathed exists in part only at testator's death

159

Where stock which has been specifically be-Section 146 queathed, exists only in part at the Act X of testator's death, the legacy is adeemed 1865 so far as regards that part of the stock which has ceased to exist

#### Illustration

A bequeaths to B his 10 000 rupees in the 51/2 per cent foan of the Government of India. A sells one half of his 10 000 rupees in the loan in question. One half of the legacy is adeemed

Non ademption of specific bequest of goods described as connected with certain place by reason of removal

A specific bequest of goods under a description Section 147 connecting them with a certain place is Act X of not adeemed by reason that they have been removed from such place from any temporary cause or by fraud, or

# Illustrations

(1) A bequeaths to B all my household goods which shall be in or about my dwelling house in Calcutta at the time of my death. The goods are removed from the house to save them from fire A died before they are brought back

(#) A bequeaths to B all my household goods which shall be in or about my dwelling house in Calcutta at the time of my death. During As absence upon a journey the whole of the goods are removed from the house. A dies without having sanctioned their removal

Neither of these legacies is adeemed

176 Ademption by removal -As a general rule the ademption of a specific legacy of goods will be effected by the mere removal of them Thus where the testator bequeathed all his household goods etc which should be in his dwelling house at B at the time of his death and he afterwards took another house into which he removed the greater part of those goods from his house at B this removal was held an ademption-Heseltine v Heseltine 3 Madd 276 see also Green v Symons 1 Bro C C 129 (note)

But no ademption by removal will take place where the goods are removed for their preservation as to save them from fire-Chapman v Hart 1 Ves Sen 273 Re Johnston 26 Cr D 538 (553) or where they are removed by fraud or without the testator's knowledge or authority-Shaftesbury v Shaftesbury 2 Vern 747

Section 148 Act X of 1865

161 The removal of the thing bequeathed from the place in which it is stated in the will

When removal of thing bequeathed does not constitute ademption

to be situated does not constitute an ademption where the place is only re ferred to in order to complete the

description of what the testator meant to bequeath

#### Illustrations

(i) A bequeaths to B all the bills bonds and other securities for money belonging to me now lying in my lodgings in Calcutta. At the time of his death these effects had been removed from his lodgings in Calcutta.

(11) A bequeaths to B all his furniture then in his house in Calcutta. The testator has a house at Calcutta and another at Chinsurah in which he liver alternately being possessed of one set of furniture only which he removes with himself to each house. At the time of his death the furniture is in the house at

(iii) A bequeaths to B all his goods on board a certain ship then lying in the river Hughli. The goods are removed by As directions to a warehouse in

which they remain at the time of As death

No one of these legacies is revoked by ademption

177 Where by the nature of the place described it is clear that their locality was not referred to as essential to the bequest as in the case of a specific legacy of goods in a ship no ademption will take place by removal-Chapman v Hart 1 Ves. Sen 273 So also no ademption takes place by removal where the testator has two houses in which he lives alternately and being possessed of one set of furniture only which he removes with himself to each house bequeaths while residing in one of them all his furniture in that house-Land v Deraynes 4 Bro C C 537 Raulinson v Raulinson 3 Ch. D 302

Where the thing bequeathed is not the right to Section 14

When thing bequeath ed is a valuable to be re ceived by testator from third person and testa tor himself or his representative receives it.

receive something of value from a 1865 third person, but the money or other commodity which may be received from the third person by the testator himself or by his representatives, the receipt of such sum of money or other com-

modity by the testator shall not constitute an ademption, but if he mixes it up with the general mass of his property, the legacy is adeemed

# Illustration

A bequeaths to B whatever sum may be received from his claims on C. A receives the whole of his claim on C. and sets it apart from the general mass of his property The legacy is not adeemed

Where a thing specifically bequeathed undergoes Section IS

a change between the date of the will 1865 Change by operation of and the testator's death and the change law of subject of specific takes place by operation of law, or in bequest between date of will and testator's death

such change

the course of execution of the provisions of any legal instrument under which the thing bequeathed was held, the legacy is not adeemed by reason of

# Illustrations

(1) A bequeaths to B all the money which I have in the 5½ per cent loan of the Government of India The securities for the 5½ per cent loan are converted during As lifetime into 5 per cent stock.

(ii) A bequeaths to B the sum of 20001 invested in Consols in the names of trustees for A The sum of 20001 is transferred by the trustees into As own

(iii) A bequeaths to B the sum of 10 000 rupees in promissory notes of the Government of India which he has power under his marriage settlement to dispose of by will Afterwards in As hietime the fund is converted into Consols by virtue of an authority contained in the settlement No one of these legacies has been adeemed

This section so far as it relates to change by operation of law is based upon the old English law At present the law is that where there is a change of property effected by virtue even of an Act of Parliament ademption will follow unless it can be shown that the property is changed in name or form only and remains substantially the same. So where a testator bequeathed the interest arising from money invested in the Lambeth Water works Co after the date of the will the testator's stock was converted into stock of a Metropolitan Water Board it was held that the bequest of the stock had been adeemed-Re Slater [1907] 1 Ch 665

Where a thing specifically bequeathed under-Section 15 goes a change between the date of the Act X of Change of subject will and the testator's death and the without testator's know change takes place without the know-

ledge or sanction of the testator, the legacy is not adeemed,

### Illustrations

(4) A bequeaths to B all my household goods which shall be in or about my dwelling house in Calcutta at the time of my death. The goods are removed from the house to save them from fire. A died before they are brought hark.

(n) A bequeaths to B all my household goods which shall be in or about my dwelling house in Calcuita at the time of my death. During As absence upon a journey, the whole of the goods are removed from the house. A dies without having sanctioned their removal.

Neither of these legaces is adeemed

176 Ademption by removal—As a general rule the ademption of a specific least) of goods will be effected by the mere removal of them. Thus, where the testator bequeathed all his household goods etc which should be in his dwelling house at B at the time of his death, and he afterwards took another house into which he removed the greater part of those goods from his house at B this removal was held an ademption—Heseltine v. Heseltine 3 Madd 276 see also Green v. Smost 1 Bro C. C. 129 (note)

But no ademption by removal will take place where the goods are removed for their preservation as to save them from fire—Chapman v Hart 1 Ves. Sen 273 Re Johnston 20 Cr D 538 (533) or where they are removed by fraud or without the testator's knowledge or authority—Shaftesbury v Shaftesbury 2 Vern 147

Section 148 Act X of 1865 161 The removal of the thing bequeathed from the

When removal of thing bequeathed does not constitute ademption place in which it is stated in the will to be situated does not constitute an ademption where the place is only referred to in order to complete the

description of what the testator meant to bequeath

#### Illustrations

(1) A bequeaths to B all the bills bonds and other securities for money belonging to me now bying in my lodgings in Calculta. At the ware of los death these effects had been removed from his lodgings in Calculta.

(iii) A bequeaths to B all his furniture then in his house in Calcutta The testator has a house at Calcutta and another at Chinsurah in which he hives alternately being possessed of one set of furniture only which he removes with himself to each house. At the time of his death the furniture is in the house at Chinsurah.

(m) A bequeaths to B all his goods on board a certain ship then lying in the river Hughi. The goods are removed by As directions to a warehouse in which they remain at the time of As death.

No one of these legacies is revoked by ademption

177 Where by the nature of the place described it is clear that their locality was not referred to as essential to the bequest as in the case of a specific legacy of goods in a ship no ademption will take place by removal—Chapman v. Hart I Ves. Sen 273 So also no ademption takes place by removal—removal where the testator has two houses in which he lives alternately and being possessed of one set of furniture only which he removes with himself to each house bequeaths while reading in one of them all his furniture in that house—Land v. Decarnes 4 Bro C. C. 537 Raulinson v. Raulinson 3 Ch. D. 302

162 Where the thing bequeathed is not the right to Section 149 recent something of value from a 1865

When thing bequeath ed is a valuable to be received by testator from third person and testa tor himself or his repre sentative receives it.

third person, but the money or other commodity which may be received from the third person by the testator himself or by his representatives, the receipt of such sum of money or other com-

modity by the testator shall not constitute an ademption, but if he mixes it up with the general mass of his property, the legacy is adeemed

# Illustration

A bequeaths to B whatever sum may be received from his claims on C. A receives the whole of his claim on C. and sets it apart from the general mass of his property The legacy is not adeemed

Where a thing specifically bequeathed undergoes Section 150 163 a change between the date of the will Act X of Change by operation of and the testator's death, and the change law of subject of specific bequest between date of takes place by operation of law, or in will and testator a death.

the course of execution of the provisions of any legal instrument under which the thing bequeathed was held, the legacy is not adeemed by reason of such change

# Illustrations

(i) A bequeaths to B all the money which I have in the 5½ per cent loan of the Government of India. The securities for the 5½ per cent loan are

of the Goldmann of sinual and executives for the 272 per cent some are converted during As lifetime into 5 per cent stock (ii) A bequeaths to B the sum of 2000 invested in Consols in the names of trustees for A. The sum of 2000 is transferred by the trustees into As own

(iii) A bequeaths to B the sum of 10 000 rupees in promissory notes of the Government of India which he has power under his marriage settlement to dispose of by will Afterwards in As lifetime the fund is converted into Consols by virtue of an authority contained in the settlement No one of these legacies has been adeemed

This section so far as it relates to change by operation of law is based upon the old English law. At present the law is that where there is a change of property effected by virtue even of an Act of Parliament ademption will follow unless it can be shown that the property is changed in name or form only and remains substantially the same. So where a testator bequeathed the interest arising from money invested in the Lambeth Water works Co and after the date of the will the testator's stock was converted into stock of a Metropolitan Water Board it was held that the bequest of the stock had been adeemed-Re Slater [1907] 1 Ch 665

164 Where a thing specifically bequeathed under-Section 151 goes a change between the date of the Act X of Change of subject will and the testator's death and the without testator's know

change takes place without the knowledge or sanction of the testator, the legacy is not adeemed.

# Illustration

A bequeaths to B all my 3 per cent Consols The Consols are without As knowledge sold by his agent and the proceeds converted into East India Stock This legacy is not adeemed

179 There is no ademption where the stock has been transferred into another fund without the knowledge or authority of the testator-Shaftesbury v Shaftesbury 2 Vern 747 So where the subject of a specific legacy was sold during the testator's Junacy by his son it was held that there was no ademption -Jenkins v Jones LR 2 Eq 323 But where after the date of the will the testator became a lunatic and by an order in the lunacy certain shares speci fically bequeathed were directed to be sold and the proceeds invested in other securities the bequest of such shares was held to be adeemed-Jones v. Green LR 5 Eq 555 Re Freer 22 Ch D 622

Section 152 Act \ of 1865

Stock specifically be queathed lent to third party on condition that

it be replaced

Where stock which has been specifically bequeathed is lent to a third party on condition that it shall be replaced, and it is replaced accordingly, the legacy is not adeemed

Section 153 Act X of 1865

166 Stock specifically be queathed sold but re placed and belonging to testator at his death

Where stock specifically bequeathed is sold, and an equal quantity of the same stock is afterwards purchased and belongs to the testator at his death, the legacy is not adeemed

180 This section is based on the dictum of Lord Talbot in Patridge v Patridge Cas Temp Talb 227 and of Lord Hardwicke in Evelyn v Ward 1 Ves Sen 426 But in Pattison v Pattison 1 M & K 12 it has been held that a legacy is adeemed by the sale of the stock and will not be revived by a new purchase of a milar stock by the testator

# CHAPTER XVII

Or the Payment of Liabilities in respect of the SUBJECT OF A BEQUEST

Section 154 Act \ of 1865

(1) Where property specifically bequeathed is 167 subject at the death of the testator to Non liability of execu tor to exonerate specific any pledge, lien or incumbrance created legatees. by the testator himself or by any per-

son under whom he claims, then, unless a contrary intention appears by the will, the legatee, if he accepts the bequest, shall accept it subject to such pledge or incumbrance, and shall (as between himself and the testator's estate) be liable to make good the amount of such pledge or incumbrance

(2) A contrary intention shall not be inferred from any direction which the will may contain for the payment of the testator's debts generally

Explanation -A periodical payment in the nature of land-revenue or in the nature of ient is not such an incumbrance as is contemplated by this section

### Illustrations

(1) A bequeaths to B the diamond ring given him by C At As death the ring is held in pawn by D to whom it has been pledged by A It is the duty of As executors if the state of the testators a sasets will allow them to allow B to redeem the ring

(n) A bequeaths to B a zamındarı which at As death is subject to a mortgage for 10000 rupees and the whole of the principal sum together with interest to the amount of 1000 rupees is due at A's death B if he accepts the bequest accepts it subject to this charge and is hable as between himself and

As estate to pay the sum of 11 000 rupees thus due

Note -This chapter (secs 167-170) applies to Hindus Buddhists etc. sce Sec. 57 and Sch III

This section is based on the Real Estate Charges Act 1854 (17 & 18 Vict C 113) commonly known as Locke King's Act Sub-section (2) is based on Locke King's Amendment Act 1877 (40 & 41 Vict. c 34)

Completion of testa tors title to things be queathed to be at cost of his estate

168 Where anything is to be done Section 155 to complete the testator's title to the 1865 thing bequeathed, it is to be done at the cost of the testator's estate

# Illustrations

(t) A having contracted in general term for the purchase of a piece of land at a certain price bequeaths it to B and dies before he has paid the purchase money. The purchase money was the made good out of As assets (it) A having contracted for the purchase of a piece of land for a certain sum of money one half of which is to be paid down and the other half secured by mortgage of the land bequeaths it to B and dies before he has paid or secured any part of his purchase money. One half of the purchase-money must be paid out of A & assets

Cases -If the purchaser of real estate dies without having paid the purchase money his heir at law or the devisee of the land purchased will be entitled to have the estate paid for by the executor or administrator-Milner v Mills Mosely 123 Broome v Monck 10 Ves 597 In such a case if the personal estate cannot be got in and the devisee pays for the land out of his own pocket he may afterwards call upon the personal representatives to re imburse him-Broome v Monck 10 Ves 597 If by reason of the complication of the testator's affairs the purchase money could not be immediately paid and the vendor for that reason rescanded the contract yet on the coming in of the assets the devisee of the estate contracted for might compel the executor to lay out the purchase-money in the purchase of other estates for his benefit-IVhittaker v Whittaker 4 Bro C C 31 Broome v Monck (cited above)

Exoneration of lega tee s immoveable perty for which land revenue or rent payable periodically

169 Where there is a bequest of any interest in im- Section 156 moveable property in respect of which Act X of payment in the nature of land-revenue or in the nature of rent has to be made periodically, the estate of the testator

shall (as between such estate and the legatee) make good such payments or a proportion of them, as the case may be, up to the day of his death

#### Illustration

A bequeaths to B a house in respect of which Rs. 365 are payable annually by way of rent. A pays his rent at the usual time, and dies 25 days after. As estate uill make good 25 rupees in respect of the rent

Note -In case of specific gift of leaseholds liabilities existing at the death of the testator must be paid out of the residue of the estate and those accrued after the death must be borne by the legatee-Theobald on Wills 6th Edn 169

Section 157 Act \ of 1865

In the absence of any direction in the will, where 170

there is a specific bequest of stock in a Exoneration of specific joint stock company, if any call or other legatee's stock in joint payment is due from the testator at the

time of his death in respect of the stock, such call or payment shall, as between the testator's estate and the legatee, be borne by the estate but, if any call or other payment becomes due in respect of such stock after the testatoi s death, the same shall as between the testator's estate and the legatee, be borne by the legatee, if he accepts the bequest

### Illustrations

(s) A bequeaths to B his shares in a certain railway. At As death there was due from him the sum of 100 rupees in respect of each share being the amount of a call which has been duly made and the sum of five rupees in respect of each share being the amount of interest which had accrued due in respect of the call These payments must be borne by As estate

(11) A has agreed to take 50 shares in an intended joint stock company and has contracted to pay up 100 rupees in respect of each share which sum must be paid before his title to the shares can be completed. A bequeaths these shares to B The estate of A must mal e good the payments which were necessary to complete As title

stock company

(su) A bequeaths to B his shares in a certain railway B accepts the legacy After As death a call is made in respect of the shares B must pay the call

(10) A bequeaths to B his shares in a joint stock company. B accepts the bequest. Afterwards the affairs of the company are wound up and each chare holder is called upon for contribution. The amount of the contribution must be

borne by the legatee

(v) A is the owner of ten shares in a railway company. At a meeting held during his lifetime a call is made of fifty rupees per share payable by three instalments. A bequeaths his shares to B and dies between the day fixed for the payment of the first and the day fixed for the payment of the second instal ment and without having paid the first instalment. As estate must pay the first instalment and B if he accepts the legacy must pay the remaining instalments.

With respect to specific legacies of shares in Banking or other Public Companies, if any payments were necessary at the testator's death to constitute him a complete shareholder they must be borne by his estate but if he was a complete shareholder all calls made after his death ought to be borne by the specific legatee and do not fall on the general estate-Blount v Hipkins 7 Sim 43 Jacques v Chambers 2 Coll 435 Chie v Cline hay 600

## CHAPTER XVIII

# Of Broulsts of Things discribed in Glneral Terms

171 If there is a bequest of something described in Section 158
Bequest of thing described in general terms, the executor must pur1865
chase for the legatee what may reasonably be considered to answer the description

### Illustrations

(1) A bequeaths to B a pair of carriage-horses or a diamond ring. The executor must provide the legatee with such articles if the state of the assets will allow it.

(#) A bequeaths to B my pair of carriage-horses. A had no carriage horses at the time of his death. The legacy fails.

Note —This section applies to Hindus Buddhists etc. see Sec 57 and Sch. III.

183 If the bequest be in general terms eg of a horse and no horse be found in the testator's possession at the time of his death the executor is bound provided the state of the assets will allow him to procure a horse for the legatee See Bronsdon v Winter Ambl 57 Illustration (1) But if there be a specific bequest of a thing described as already in existence and no such thing did ever exist among the testators effects the gift fails. Thus if there is a gift of my grey horse and the testator had no horse at his death the executor is not bound to buy a grey horse for the legatee—Evans v Tripp 6 Maddock 92 see also Illus (11)

## CHAPTER XIX

OF BEQUESTS OF THE INTERLST OR PRODUCE OF A FUND Section 159

172 Where the interest or produce of a fund is be-Act of -

Bequest of interest or produce of fund affords no indication of an intention that the enjoyment of the bequest should be of limited duration, the principal as well as the interest shall belong to the legatee

#### Illustrations

(f) A bequeaths to B the interest of his 5 per cent promissory notes of the Government of India. There is no other clause in the will affecting those securities B is entitled to A s 5 per cent promissory notes of the Government of India.

S is cluttled to the per cent promisory motes of the Comment of India to B for his 15% per cent promisory notes of the comment of India to B for his life and after his death to C B is entitled to the notes upon B is death.

S is death, and bequeaths to B the rents of his lands at \(\lambda\) B is entitled to the lands

Note —This section applies to Hindus, Buddhists etc; see Sec 57 and Sch III

184 Although this section speaks of a fund it applies to immovable property also—Vandadam v Inunbala 3 CL J 515 (519); Administrator General v Ilughts 10 Cal 192 (211) Cf Illus. (iii)

185 Cases —Where the interest or produce of a fund is bequeathed to a legatee or in trust for him without any limitation as to continuance the principal will be regarded as bequeathed also—Ellion v. Sheppard. 1 Bro. C. C. 552 Phillips v. Chamberlaine 1 Ves. 51 Stretch v. Walkins. 1 Madd. 233 Thus, an indefinite gift of the dividends gives the absolute property of the stock—Page v. Leapinguill. 18 Ves. 463. Haig v. Sumey. 1 Sim. 8. Stu. 490. So also a bequest of rent will pass the land steelf—Ashton v. Idamson. 1 Dr. & IV. 198. A bequest to a woman of a fund with the interest thereon to be vested in trustees the income arising therefrom to be for her sole use and benefit vests the cantual for her secondary use.—Admisson v. Armitase. 19 Ves. 416

A gift of the interest of a certain fund to be enjoyed by the legatees from ceneration to generation was held to be an absolute gift of the fund itself-Administrator General v. Money 15 Mad 448 (467) A gift under a will to certain persons and their heirs for ever of certain annuities, being specific shares of the rents and profits of an estate was held to amount to a gift of shares in the corpus of the estate corresponding with the share of the profits-Hemangini v Nobin Chand 8 Cal 788 (801) A gift of the surplus revenues of certain lands to the members of a joint family after defraying the expenses of certain religious trusts was held to confer the beneficial ownership in the lands on the family subject to the performance of those trusts-Asutosh > Doorga Churn 5 Cal 438 (444 445) (PC) Where the testator directed that half the net income from a certain property should be paid to the legatee for life and after her death to her children for life and there was also a provision that if the property should be sold one half of the sale proceeds should be paid to the legatee and the children that might be born to her held that the bequest to the legatee was a bequest of a mojety of the specific property itself-Iulia Fernandez v Severina Coelho 20 LW 748 AIR 1925 Mad 418 (420) 84 IC 1029 A gift of income without more is a gift of the corpus even though the gift is to the separate use or through the medium of a trust-Administrator General v Hughes 40 Cal 192 (214) 21 I C 183 Theobald on Wills 6th Edn p 465 But where a testator directed that his estate should remain intact, and that his heirs sons grand sons great grandsons and so on in succession should be entitled to enjoy the profits it was held that the intention was that the estate was not to be disposed of and that there was no gift of the estate but simply a gift with reference to the enjoyment of the profits from generation to generation which could not be held to be a gift of the corpus of the property The will was therefore invalid and the estate would pass as if it had not been disposed of by will-Shookmoy v Monoharrs 11 Cal 684 (693) (PC) explained in Hemangini v Nobin Chand 8 Cal 788 (801 802)

186 Contrary meenton —This section does not apply where there is a clear indication of the intention of the testator that the enjoyment of the be quest by the legatee should be of limited duration. Thus a bequest of the profits of an estate to a Hindu widow for life with the remainder absolutely to the nephew confers only a life estate on the widow—Mandakini v Arinabala 3 C L J 515 (519). A direction by a testator that an immoscable property should be retuined in the hands of trustees appointed by the will and that the balance of the rents and profits after the payment of expenses should be used and enjoyed by the testators som G in such imanore as he might think proper with a provision empowering the soms of such on to call him to account for the management of

the property on attaining the age of 21 and with a direct though void gift over to the grandsons of such son confers only a life-estate on G the vesting of the property in trustees the right of Gs sons to ask for an account and the gift over to Gs grandsons-all these how an intention on the testator's part that the enjoyment of the bequest should be of a limited duration-Anand Rao v Adminis trator General 20 Bom 450 (164) Where the testator vested his property in trustees and directed them to pay the income therefrom after deducting expenses to his son who was to utilize the same for the maintenance of himself and his family held that the son was not entitled to an absolute estate-Vullubhdas v Thucker 14 Born. 360 Where a testator gave the income of his houses to his two cons in the event of his wife's death and provided that the heirs of the sons should also enjoy such income it was held by the Bombay High Court in Damodardas \ Dayabhas 21 Born 1 (16) that there was sufficient evidence of a contrary intention within the meaning of this section restricting the interest of the sons for their lives but this decision was reversed by Privy Council who held that each of the sons took an absolute interest-Damodardas v Daya blas 22 Bom 833 (841) (PC) Where a testator gave his grand daughter the rent of a house and the ownership after her death to her children held that she took only a life intere t, although at the testator's death she had no children-Karsandas v Ladkavahu 12 Bom 185 (198)

But where there was a bequest of the income of a property to A to be enjoyed by him for maintenance (with right to spend the whole income for his family a maintenance if necessary) and if A turned out to be of bad character certain other persons were directed to take the property out of As hands and A did not in fact turn out to be of bad character it was held under the circum stances that the testator did not intend to limit the duration of the enjoyment of the income of the property by A and that therefore the corpus of the property should be taken to have been given to A absolutely-Mannu v Lachman 1932

ALJ 476 141 IC 650 AJR 1932 All 476 (477)

## CHAPTER XX

## O1 Broursts of Annuities

173 Where an annuity is created by will, the legatee Section160

Annuity created by will payable for life only unless contrary intention appears by will is entitled to receive it for his life only, Act X of unless a contrary intention appears by the will, notwithstanding that the annuity is directed to be paid out of the

property generally, or that a sum of money is bequeathed to be invested in the purchase of it

### Illustrations

(1) A bequeaths to B 500 rupees a year B is entitled during his life to receive the annual sum of 500 rupees (n) A bequeaths to B the sum of 500 rupees monthly B is entitled during

has life to rective the sum of 500 rupees every month.

(ii) A bequeaths an annually of 500 rupees during his life to resulted to an annually of 500 rupees during his life. C if he survives to C B is entitled to an annually of 500 rupees during his life. C if he survives

B is entitled to an annuity of 500 rupees from B's death until his own death

Note —This chapter (secs. 173-176) applies to Hindus Buddhists, etc. see Sec 57 and Sch. HI

The word notwithstanding has been substituted for the words and this rule shall not be varied by the circumstance. The change is merely verbal

187 "For his life only"—An annuty may be perpetual or for life or for any period of years but in ordinary acceptation of the term used if it should be said that a testator had left another an annuty of 21 000 per annum no doubt would occur of the gift being an annuity for the life of the donee—Williams on Executors 11th Edin p 947 Blustix Roberts 1 Cr & Ph 274 (280) Accordingly a simple gift of an annuity to A does not give an annuity beyond the life of A—Kerr v Middleser Hospital 2 DeG M & G 583 (per Lord St. Leonards) A bequest of £30 a year from the interest of any funded property in the Bank of England does not amount to a bequest of so much stock as would produce that annual sum but constitutes an annual charge of £30 upon the funded property for the life of the legatee—Wilson v Maddson 2 Y & Cool Ch C 372

If an annuity be given to one for life and after his death to another simply the latter does not necessarily take an absolute interest in the annuity-Williams p 947 Blight v Hartnoll 19 Ch D 297 (per Fry L I ) see also Illus (iii) A gift of an annuity beyond the life of the first taker is not of itself a sufficient indication that it should be a metual-Bleustt v. Roberts 10 Sim 491 make an annuity perpetual there must be express words in the will so describing it or the testator must by some language in the will indicate an intention to that effect. The most common indication of such intention is a direction by the testator to segregate and appropriate a portion of his property from the interest or profits of which the annuity is to be paid. When this is done the annuity when mentioned in the will represents the corpus so appropriated and the corpus passing by the bequest of the annuity the annuity may be said to be perpetual -ber Lord Campbell L.C. in Lett v. Randall 2 DeG F & G 388 (392) the mere appropriation of prop rty to meet an annuity is not always a sufficient indication of the testator's intention to make the annuity perpetual-lines v Mstchell 9 Ves 212 Thus the fact that an annuity is charged on the village revenues does not serve as an indication of an intention to create an annuity as co equal in duration with the property itself-Gopala Krishna \ Ramnath 5 Bom LR 729 On the other hand the segregation of any particular property is not the only mode of indicating an intention to make the annuity perpetual and the will may indicate an intention in other ways that the sum payable is really not a mere annuity for life but is intended to be perpetual-Panchu Gobal v. Kalidas 24 CWN 592 (596) 54 IC 140

As a general rule there can be no doubt that the gift of an annuity to A is a gift of the annuity during the life of A and nothing more. It is equally free from doubt that where the testator indicates the existence of the annuity without limit after the death of the person named and therefore implie that it is to exist beyond the life of the annutant there the annuity is presumed to be a perpetual annuity. It is equally without doubt that there are cases in which the Court has come to the conclusion that the gift is really not that of annuity but the gift to a person of the income ansuig from a particular fund without limit and there the Court holds that the unlimited gift of the income is a gift of the corpus from which the income aris s—p-r Fry LJ in Blight v. Harthroll (1881) 19 Ch D 291 followed in Panchia Geplat v. Adidaes 21 Cf Wi S52 (595) 53 IC 140

Both under the Indian and the English law the question whether the annuity is given in perpetuity or for life only depends upon the intention of the testator

nd this intention need not be indicated by express words in the will but must a gathered from the language of the will as a whole—Panchugopal v Kahdas 4 CWN 592 (598) 54 IC 140 Nidatimath v Saropath 62 IC 681 (683) Cal) Rajlahshi v Sarola 56 IC 803 (804) (Cal) A Hindiu by his will interest that his second son was to give Rs 500 per annum to the fourth son ut of the profits of the property demised to the former it was held on a construction of the will that the grant of the annuity in favour of the fourth on was perpetual and heritable and not merely for the life of the grantee—Villatimath v. Saropath supra

The latter part of this section lays down that an annuity is to be for life only even though a sum of money is bequeathed to be invested in the purchase of it. But this provision is at variance with the English law according to which if the beque t is a gift of property which will produce the amount of the annuity or in other words if the will dedicates the corpus of a fund to the purchase of the annuity it is a gift in perpetuity—Stocks v Heron 12 Cl & F 161 Kerr v M dalless Hospital 2 De6 M & 6 577 (584) Ross v Borer 2 Johns & H 489

For rules regarding payment and apportionment of annuities see secs 338 340

or retes referring haltitue and abhorementions or structures acc accs 200 ago

Penod of vesting where will directs that annuity be provided out of proceeds of property generally or where money bequeathed to be invested in purchase of annuity

174

Where the will directs that an annuity shall be Section 161 provided for any person out of the pro- Act X of ceeds of property, or out of property 1865 ceeds of property 1865 ceeds of property, or out of property 1865 ceeds of property 1865 ceeds of property, or out of property 1865 ceeds of property 1865 ceeds of property 1865 ceeds of property 1865 ceeds of property, or out of property 1865 ceeds of property 1865

at his option to have an annuity purchased for him or to receive the money appropriated for that purpose by the will

### Illustrations

(1) A by his will directs that his executors shall out of his property purchase an annuity of 1000 rupees for B B is entitled at his option to have an annuity of 1000 rupees for his life purchased for him or to receive such a sum as will be sufficient for the purchase of such an annuity

(n) A bequeaths a fund to B for his life and directs that after Bs death it that be laid out in the purchase of an annuity for C B and C survive the testator C dies in Bs lifetime On Bs death the fund belongs to the representative of C

188 Where the money is bequeathed to be invested in the purchase of an annuity for the life of the legatee and the legatee does before it is land out or before the will is proved or even before the fund is available (e.g. if he dies during the life of the person after whose death the investment is to be made) still it is vested legacy from the death of the testator and the sum will belong to the personal representatives of the legatee—lates v. Compton 2.P. Wins. 309. Re Vidobiet (1881) 1.C. 1070. Re Robins [1907) 2.C.h. 8. And if the legatee for whose benefit it was intended survives the testator he may elect either to take the sum or to has et land out in annuity—Siecks v. Check 2.8 Bea 2.20. Dauson v. Hearn 1. Russ. & M. 605 (608). Kerr. v. Middlexer Hospital. 2.DeG.

Section 162 Act 3 of 1865

Where an annuity is bequeathed, but the assets of the testator are not sufficient to pay Abatement of annuity all the legacies given by the will, the annuity shall abate in the same proportion as the other pecuniary legacies given by the will

189 An annuity charged on the per onal estate is a general legacy and therefore as between annuitants and legatees there is no priority where there is a deficient estate but both must abate proportionately. This principle will equally apply whether an annuity is to commence immediately on the death of the testator or at a future period-Innes v Mitchell 1 Phil Ch C 716 But if annuities are given as specific gifts of interest in the real estate they shall not abate with the legacies charged generally on the real estate-Creed v Creed 11 C1 & F 491

Section 163 Act X of 1863

fierd

Where there is a gift of an annuity and a resi-176

Where gift of annuity and residuary gift whole annuity to be first satis

duary gift, the whole of the annuity is to be satisfied before any part of the residue is paid to the residuary legatee. and, if necessary, the capital of the

testator s estate shall be applied for that purpose

190 Principle -A residuary legatee has no right to call upon particular reneral levatees to abate. The whole personal e tate not specifically bequeathed must be exhausted before those legatees can be obliged to contribute anything out of their bequests-Purse v Snaplin I Ath 418 So if there is a simple bequest of an annuity there is no doubt but that however great or small the income of the te tator's property may be the annuity must be paid in full to the last farthing of the property. If there is a gift of an annuity and a residuary gift and the estate proves insufficient the annuity takes precedence and the whole loss falls on the residuary legater-Croly v Wold 3 DeG M & G 993 (99a 996)

## CHAPTER XXI

Or Ligacies to Creditors and Portioners

Section 164 Act 3 of 186<sub>J</sub>

Where a debtor bequeaths a legacy to his creditor, and it does not appear from the will Creditor prima facie that the legacy is meant as a satisfacentitled to legacy as well as debt. tion of the debt, the creditor shall be

entitled to the legacy as well as to the amount of the debt

This chapter (secs. 177 179) applies to Hindus Buddhists etc. see Sec. 57 and Sch. III

191 Rule differs from English law .- The rule in this section abolishes the doctrine of satisfa tion and is opposed to the rule of English law In Fucland it has been established by the Courts of Equity that where a debtor beg eaths to his creditor a legacy equal to or exceeding the amount of his debt

it will be presumed in the absence of any intimation of a contrary intention that the legacy was meant by the testator as a satisfaction of the debt-Talbot v Shreusbury Prec Ch 394 Brown v Dauson Prec Ch 240 Re Fletcher (1888) 38 Ch D 373 Re Rattenbury [1906] 1 Ch 667 (670) The rule in this section is just the opposite inasmuch as the legatee is entitled to the debt as well as to the legacy and it is only if the will expressly states that the legacy is meant as a satisfaction of the debt that the rule of satisfaction applies. Thus where A deposited a sum of Rs. 9000 with B and B by a will bequeathed a sum of Rs 9000 as bakshish to A it was held that A was entitled to his deposit of Rs 9000 as well as to the legacy of Rs 9000-Hasanals v Popatlal 37 Bom. 211 17 I C 17 (18 19) But where A deposited a sum of Rs 10 000 with B and B made a will stating The money of A to the extent of Rs 10000 is kept with me So that money should be given to him it was held that the bequest of Rs. 10 000 was clearly meant as a satisfaction of the indebtedness of the testator to A and A was not entitled to get the money twice (as a debt and as a legacy) -Rajamannar v Venkata Krishnayya 25 Mad 361 (363) Where B executed a promissory note for Rs 15 000 in favour of A and also bequeathed the sum of Rs 15 000 to A and it vas found that the pro note was hollow as B never borrowed any money from A it was held that A was entitled to get Rs 15 000 only that the promissory note referred to the ame sum as the legacy and that it was not intended to give any additional sum-Namberumal v Veeraberumal 56 MLJ 596 128 IC 689 AIR 1930 Mad 956 (960)

Child prima facte en tract to provide a portion for a child, Act X of fails to do so, and afterwards bequeaths a legacy as well as portion as by his will that the legacy is meant as a satisfaction of the portion, the child shall be entitled to receive the legacy

as well as the portion

#### Illustration

A by articles entered into in contemplation of his marriage with B covering anticle that he would pay to each of the daughters of the intended marriage a portion of 20 000 rupees on her marriage. This covering that may been broken A bequesths 20 000 rupees to each of the married daughters of himself and B The legates are entitled to the benefit of this bequest in addition to their portions.

192 Rule differs from English law —This section like the preceding one differs from the English law where it is laid down that where a
parent is under an obligation to provide portions for his cludden and he after
wards makes a provision by will for them such testamentary provision shall
prima facte be presumed to be a satisfaction or performance of the obligation—
Bruch v Bruch 2 Vern 439 Copley v Copley 1 Wms, 147 If the bequest
be less in amount than the portions or payable at different periods such legacies
vill still be considered satisfaction either in full or in part according to circum
stances—Jesson v Jesson 2 Vern 255 Finch v Finch 1 Ves 534 Thyrine v
Glengall 2 HLC, 131 (154)

No ademption by subsequent provision for legatee 179 No bequest shall be wholly or Section 166 partially adeemed by a subsequent pro- Act X of vision made by settlement or otherwise. 1865 for the legatee

Thus, D a Hindu sidow died making a will in respect of property which she had inherited from her husband; she bequeathed Rz, 2000 as a legary to the plaintiff and the immovcable property to K. Both the plaintiff and K were the heirs of her husband. The plaintiff sued for the legacy under the will as well as for half the immovcable property as heir. Hidd that as the widow had not the power to devise the immovcable property (to which she was not entitled absolutely) it must be considered that she had devised a property which did not belong to her consequentify the plaintiff must be put to his election either to take the legacy under the will or half the property as heir—Mangaldas v. Ranchoddas 11 Bom 438 (441)

The doctrine of election applies to all kinds of property and persons. There is no distinction for the purposes of election between personal estate and real estate between specific and residuary legatees or between legatees and the next of kin of an estate—per Jones L J in Cooper v. Cooper L R 6 Ch 15

It is applicable to moveable and immoveable properties alike—Cooper v Cooper LR 6 Ch 15 (19)

The doctrine is applicable to vested as well as contingent interests to reversionary and remote as well as immediate interests—Wilson v Lord Town shed 2 Ves J 693 (697) Webb v Shaftesbury 7 Ves 481

Testator's intention to give property not his own -In order to raise a case of election it is necessary that the intention of the testator to dispose of the property which is not his own should be clear. The intention must appear by demonstration plain or by necessary implication-Rancliffe v Parkins 6 Dow 179 Johnson v Telford 1 Russ & M 244 Crabb v Crabb 1 M & L 511 Dillon v Parker 7 Blish N S 325 Dummer Pilcher 5 Sim 35 A mere recital in a will that A is entitled to certain property but not declaring the intention of the testator to give it to him is insufficient to show the intention of the testator and to raise a case of election-Dashwood v Peston 18 Ves 41 The doctrine of election does not apply where the testator has some present interest in the estate disposed of by him though it is not entirely his own. In such a case unless there is an intention clearly manifested in the will or a necessary implication on his part to dispose of the whole of the estate including the interest of third persons he will be presumed to dispose of that which he might lawfully dispose of and no more-Grissell v Swinhoe LR 7 Eq 291 Wilkinson v Dent 6 Ch 339

The intention must appear on the face of the will itself for parol evidence will not be admissible for the purpose of showing it—Stratton v. Best. 1 Ves. 285. Doe v. Chichester 4. Dow 65.

197 Different nature of the two properties no bar to election ... A who was managing the properties inherited by the daughter of his deceased brother dicel leaving a will whereby he bequeathed a portion of those properties to B and a sum of Rs 800 to his niece. In a suit brought by the niece to recover the properties inherited by her and bequeathed to B and also the legacy of Rs 800 held that the doctrine of election applied notwith standing that the niece would get an absolute right in the sum bequeathed to her while B would take only her life interest in the properties bequeathed to him—Ammalia V Ponnammal 36 ML J 507 49 LC 527

198 Revocation —An election made under a misconception of the extent of the claims of the fund elected may be revoked—Kidney v. Coussmaker 12 Ves 136 A disclaimer of legacy can before the legacy is otherwise dealt with be retracted by the le\_atee—Re Young [1913] 1 Ch. 272

Devolution of interest

181 An interest relinquished in the circumstances Section 168 stated in section 180 shall devolve as if 1865 it had not been disposed of by the will

relinguished by owner in favour of the legatee, subject, nevertheless, to the charge of making good to the disappointed legatee the amount or value of the gift attempted to be given to him by the will

199 If the legatee does not take according to the instrument he must relinquish the benefit conferred upon him, and the benefit so relinquished shall revert to the testator's estate on the principle that it is impossible to ascertain what the testator would have done if he were aware of the defect in his instrument. And the Court cannot speculate what would have been his intention under the circumstances-Whistler \ Webster 2 Ves. 370 In re Brookshank 34 Ch D 163 But the disappointed legatee is entitled to take out of the benefit the value of the property attempted to be transferred to him

There is a distinction between the English and the Indian Law as to the disposal of the balance left after atisfying the disappointed legatee. Under the English Law the balance goes to the refractory legatee whereas under the Indian Law the balance goes to the testator's residuary estate. Thus in Illustra tion (s) to section 182 if C elects to retain the farm of Sultangur he forfeits the gift of Rs 1000 but B is entitled to get Rs 800 the value of the property attempted to be transferred to him. The remaining Rs. 200 will go according to Indian Law to As residuary estate but according to English Law it will go to C See Dillon v Parker 1 Swan 394 Under the modern English Law the donee by electing against the instrument does not incur a forfeiture of the whole benefit conferred on him but is merely bound to make compensation out of it to the disappointed transferee and after making compensation takes the

balance himself. In other words compensation and not forfeiture is the principle on which the doctrine of election proceeds. Williams on Executors 11th Edn

The provisions of sections 180 and 181 apply Section 169 whether the testator does or does not Act X of

Testators belief as to his ownership immaterial

Vol 2 pp 1188 1189

believe that which he professes to dispose of by his will to be his own

### Illustrations

(i) The firm of Sultanpur was the property of C A bequeathed it to B giving a legacy of 1000 rupees to C C has elected to retain his farm of Sultan pur which is worth 800 rupees. C forfeits his legacy of 1000 rupees of which 800 rupees goes to B and the remaining 200 rupees falls into the residuary bequest or devolves according to the rules of inte-tate succession as the case.

may be (11) A bequeaths an estate to B in case B's elder brother (who is married and has children) shall leave no issue hving at his death. A also bequeaths to C a lewel which belongs to B. B must elect to give up the lewel or to lose the

(m) A bequeaths to B 1000 rupees and to C an estate which will under a settlement belong to B if his brother (who is married and has children) shall leave no issue high at his death. B must elect to give up the estate or to lose the legacy

(10) A a person of the age of 18 domiciled in British India but owning real property in England, to which C is heir at law, bequeaths a legacy to C and, subject thereto devises and bequeaths to B all my property whatsoever and wheresoever and dies under 21. The real property in England does not pass by the will C may claim his legacy without giving up the real property in England

200 Testator's belief immaterial —The testator's belief as to his ownership is immaterial. It is not necessary to prove that he was aware that the subject of disposition was not his own—Coult's v Actuorit's P.Q. 519. The obligation of malving election will be equally impo ed on the legatee although the testator proceeded on an erroneous supposition that both the subjects of bequest were absolutely at his own disposal—williams on Executors 11th Edn. Vol. II p. 1182. Thelliason v Woodlord 13 Ves. 221 Webby v. Vebb. 2 Ves. & B. 199. Re Brookshank 34 Ch. D. 160. A case of election would arise where the testator has bequeathed somebody else s property through mistake or by design. For the Court cannot busy itself with speculation upon what the testator would have done if he had known that the property was not his—Whistler v. Webster 2 Ves. 367 (370). So when it appears that the testator meant only to dispose of his property provided he had power to do so no case of election arites—Chierch v. Aemble 5 Sim 525.

The Illustrations are mappropriate under this section Illustrations (ii) (iii) and (iv) ought to have been placed under sec 180 and Illustration (i) under sec 181

Section 170 Act X of 1865 Bequest for man s bene fit how regarded for pur nose of election 183 A bequest for a person s benefit is for the purpose of election the same thing as a bequest made to himself

#### Illustration

The farm of Sultanpur Khurd being the property of B A bequeathed it to C and bequeathed another farm called Sultanpur Buzurg to his own executors with a direction that it should be sold and the proceeds applied in payment of Bs debts B must elect whether he will abide by the will or keep his farm of Sultanpur Khurd in opposition to it.

Section 171 Act X of 1865

Person deriving benefit indirectly not put to election 184 A person taking no benefit directly under a will, but deriving a benefit under it indirectly, is not put to his election.

#### Illustration

The lands of Sultangur are settled upon C for life and after his death upon D his only child A bequeaths the lands of Sultangur to B and 1000 ripres to C C thes intestate shortly after the testator and without having made any election D takes out administration to C c and as administrator elects on behalf of Cs estate to take under the will. In that capacity he receives the legacy of 1000 ripres and accounts to B for the rents of the lards of Sultangur which accrued after the death of the testator and before the death of C. In his individual character he retains the lands of Sultangur in oppo-ution to the will

201 Person taking benefit indirectly need not elect —The doctine of election does not preclude a party claiming by the will from enjoying a denyative interest to which lie is entitled at law under a legal estate taken in opposition to the will—Williams on Executors Vol II p 1185 Where under a will the legalete is given a gift in his own right or where he takes as his wife's administrator, no case for election ares—Grissill y Sumber 7 En 291

Where a lady elected to take a certain estate under a will which purported to dispose of her property and that of her husband it was held that the benefit which the husband consequently took as tenant by courtesy did not raise a case for election as the benefit was both indirect and derivative-Lady Cavan v Pulteney 2 Ves Jun 544

Person taking in in dividual capacity under will may in other character elect to take in norticongo

185 A person who in his individual Section 1 capacity takes a benefit under a will Act X of may, in another character, elect to take in opposition to the will

### Illustration

The estate of Sultanpur is settled upon A for life and after his death upon B A leaves the estate of Sultanpur to D and 2000 rupees to B and 1000 rupees to C who is Bs child B dies intestate shortly after the testator without having made an election C takes out administration to B and as administrator elects to keep the estate of Sultanpur in opposition to the will and to relinquish the legacy of 2000 rupees. C may do this and yet claim his legacy of 1 000 rupees under the will

Person acting in different capacities ... The rule of election is that a person who has accepted the will in its entirety has acquiesced in all its provisions and has elected to take under it and has even executed a release in respect of a property to which he would have been entitled otherwise than under the will cannot afterwards maintain a suit for an account of the rents and profits of the same property-Tribhor and as v Yorke Smith 20 Bom 316 (337) But where a person takes a benefit under his will in a capacity different from that in which he asserts his rights no question of election can arise merely because owing to certain circumstances the two capacities have temporarily merged in him -Deputy Commissioner v Ram Sarub 20 OC 243 42 IC 18 (20)

On the same principle a person who has acted in opposition to the will in one capacity can in another capacity claim under the will. Thus a person who has once disputed the validity of the will and claimed a property as the heir of the testator may after being defeated in the suit claim a legacy given to him by the testator out of that property-Rajamannar v Venkatakrisi nayya 25 Mad 361 (364 365)

Notwithstanding anything contained in sections Section 17 180 to 185, where a particular gift is Act X of

Exception to provisions expressed in the will to be in lieu of of last six sections. something belonging to the legatee

which is also in terms disposed of by the will, then if the legatee claims that thing, he must relinquish the particular gift, but he is not bound to relinquish any other benefit given to him by the will

#### Illustration

Under As marriage settlement his wife is entitled if she survives him to the enjoyment of the estate of Sultangur during her life. A by his will bequeaths to his wife an annuity of 200 rupees during her life in heu of her interest in the catate of Sultangur which estate he bequeaths to his son. He also gives his wife a legacy of 1000 rupees. The widow elects to take what she is entitled to under the settlement. She is bound to relinquish the annuity but not the legacy of 1,000 rupees,

Cases -Where a Hindu testator in bequeathing all his property included therein the share of the brother's widow but made a suitable provision for her maintenance and the widow at first sued for and obtained the allowance for maintenance but subsequently sued for her share in her husband's property neld that the second suit be barred having regard to the doctrine of election as the widow must have known that the maintenance was provided for in heu of her husband's property-Pramada Dass v Lakhs Natain 12 Cal 60 (62)

Section 173 Act X of 1865

Acceptance of a benefit given by a will constitutes an election by the legatee to take under When acceptance of

benefit given by will constitutes election to take under will

the will, if he had knowledge of his right to elect and of those circumstances which would influence the judgment of

a reasonable man in making an election, or if he waives inquiry into the circumstances

### Illustrations (1) A is owner of an estate called Sultanpur Khurd and has a life interest

in another estate called Sultanpur Buzurg to which upon his death his son B will be absolutely entitled. The will of A gives the estate of Sultanpur Khurd will be absolutely entitled. The will of a gives the estate of Sulfanjon Khilado to B and the estate of Sulfanjon Buzurg of C B in ignorance of his own right to the estate of Sulfanjon Buzurg allows C to take possession of it and enters into possession of the estate of Sulfanjon khurd B has not confirmed the bequest of Sultanpur Buzurg to C (#) B the eldest son of A is the possessor of an estate called Sultanpur A bequeaths Sultanpur to C and to B the residue of As property B having

been informed by As executors that the residue will amount to 5 000 rupees allows C to take possession of Sultanpur. He afterwards discovers that the residue does not amount to more than 500 rupees B has not confirmed the bequest of the estate of Sultanpur to C

204 Implied election -No person is bound by the principle of election unless he has the knowledge of his right to elect and of the circumstances which would influence the judgment of a reasonable man in making the election-Lalit Mohan v Nirodmoy: 101 IC 339 AIR 1927 Cal 494 (495) The inquiry as to what act or acquiescence constitutes an implied election, must be decided rather by the circumstances of each case than by any general principle. The questions are whether the parties acting or acquiescing were aware of their rights (sec 187) whether they intended election whether they can restore the individuals affected by their claims to the same situation as if the acts had never been performed (sec 188) or whether these inquiries are precluded by lapse of time (sec 189)-Williams (11th Edn.) p 1188 Dillon v Parker 1 Swanst 332 (Note) Grissill v Suinhoe LR 7 Eq 291 Cooper v Cooper LR 6 Ch 15 7 H L 53

Section 174 Act A of 1865

(1) Such knowledge or waiver of inquiry shall, 188 in the absence of evidence to the con-Circumstances in which trary, be presumed if the legatee has knowledge or warter is enjoyed for two years the benefits presumed or inferred.

provided for him by the will without doing any act to express dissent

Section 175 (2) Such knowledge or waiver of inquiry may be in-Act \ of 1805

ferred from any act of the legatee which renders it impos

sible to place the persons interested in the subject-matter of the bequest in the same condition as if such act had not been done

### Illustration

A bequeaths to B an estate to which C is entitled and to C a coal mine C hates possession of the mine and exhausts it. He has thereby confirmed the bequest of the estate to B

205 Two years' enjoyment -Acceptance of a benefit may be pre umed from two years enjoyment of the benefit Thus where a donee on her mother's death entered on the land and from that time continued in possession for two years received the rents made no application to the trustees to sell nor brought a bill against them to sell though she had a right to apply to them to sell and as cestus que trust might have contracted for selling held that such action raises a presumption of acceptance-Crabtree v Bramble 3 Ath 680 But if a person acts in ignorance of his right no presumption will be made in favour of acceptance even though the possession be for 2 years or more-Lalit Mohan v Nirodamoy: 101 I C 339 A I R 1927 Cal 494 (495) Thus where a person on whom a benefit has been conferred had been in receipt of the same for 16 years being ignorant of his right to elect it was held that he was not estopped from acting the other way-Soputh v Manghan 30 Beav 235 So also where the legatee is pardanaskin lady of slight education and there is no evidence that she knew anything about the contents of the will or that the will was ever explained to her and it further appears that the executors never called upon her (as they are required to do under section 189) to make her election the mere fact that she took the benefits for 2 years will not lead the Court to presume under sec 188 (1) that she had impliedly made her election especially when the receipt of money by her did not render it impossible to place the parties in the same position as if the money had not been taken so as to make clause (2) applicable-Indubala v Manmatha 41 CLJ 258 AIR 1925 Cal 724 (727 729) 87 IC 404

It should be noted that clause (1) differs from clause (2) in that the circumstances mentioned in the latter merely permit the inference while the circumstances mentioned in the former make the inference inevitable—Indubala v Manmalka supra

189 If the legatee does not, within one year after the Section 176

When testators representatives may call upon legate to elect legate to elect

legate to elect to confirm or to dissent from the will, the representatives shall, upon the expiration of that period, require him to make his election, and, if he does not comply with such requisition within a reasonable time after he has received it, he shall be deemed to have elected to confirm the will

206 Time for election —The Indian law specifies a time within which an election must be made but in England no such time is fixed by law 11 however a time is limited by the instrument itself the donce must elect within that period and if he fails to do so he will be deemed to have renounced the benefit under the instrument—Dullon v. Parker 1 Swan. 332

Section 177 Act X of 1865

190 In case of disability the election shall be post

Postponement of election in case of disability poned until the disability ceases, or until the election is made by some competen authority

Minor -In the case of a minor the period of election will b postponed during the minority unless the minor is represented by a qualified guardian in which case he can elect. In England the usual practice is for the Court to elect for the infant if it is for its benefit-Morrison v Bell 5 Ir Eq R 354 Re Chesham 31 Ch D 466 (472) and for that purpose the Court directs an inquiry whether it is to the advantage of the infant to elect or disclaim-Brown v Brown LR 2 Eq 481 (486)

## CHAPTER XXIII

## Of Gilts in Contemplation of Death

Section 178 Act X of 1865

Property transferable by gift made in con templation of death

191 (1) A man may dispose, by gift made in contemplation of death, of any moveable property which he could dispose of by will

- (2) A gift is said to be made in contemplation of death where a man, who is ill and expects to die shortly of his illness, delivers to another the possession of any moveable property to keep as a gift in case the donor shall die of that illness
- (3) Such a gift may be resumed by the giver and shall not tale effect if he recovers from the illness during which it was made nor if he survives the person to whom it was made

#### Illustrations

- (a) A being ill and in expectation of death, delivers to B to be retained by him in case of As death.
  - a watch
  - 4 bond granted by C to A a bank note
  - a promissory note of the Government of India endorsed in blank a bill of exchange endorsed in blank
  - certain mortgage deeds. A dies of the illness during which he delivered these articles. B is entitled to
    - the watch
    - the debt secured by Cs bond
    - the bank note
    - the promissory note of the Covernment of India the bill of exchange
- the money secured by the mortgage deeds
  (ii) A being ill and in expectation of death delivers to B the key of a trunk or the key of a warehouse in which goods of bulk belonging to A are deposited with the intention of giving him the control over the contents of the trunk

or over the deposited goods and de\_res him to keep them in case of As death A dies of the illness during which he delivers these articles B is entitled to the trunk and its contents or to As goods of bulk in the warehouse

(in) A being ill and in expectation of death puts aside certain articles in separate parcels and marks upon parcels respectively the names of B and C. The parcels are not delivered during the life of A. A dies of the illness during which he set aside the parcels. B and C are not entitled to the contents of the parcels.

208 Donatio mortis causa —The gift must be made with a view to thomor's death—Dufield v. Eleues 1 Bligh N S 530. The cyndence must be clear that the donor gave it in contemplation of death. The burdene of proof is necessarily on the donee and no case ought to prevail unless it is supported by evidence of the clearest and most unequivocal character—Cosnahan v. Grice. 15 Moo PC 215 If a gift be not made by the donor in peril of his death i.e. with relation to his decease by illness affecting him at the time of the gift it cannot be supported as a donatio mortis causa—Tate v. Hilbert. 2 Ves. 121 Gardiner v. Parker. 3 Madd. 185. Where it appears that the donation was made whilst the donor was ill and only a few days or weeks before his death it will be presumed that the gift was made in contemplation of death and in the donor is last illness—Gardiner v. Parker. (supra.)

The donatio mortus causa is always subject to the condition that if the donor live the thing shall be restored to him but it is not necessary that the donor should expressly declare that the gift is to be accompanied by such a condition for if a gift be made during the donor's last illness the law infers the condition that the done is to hold the donation only in case the donor due of that indisposition—Roper on Legacy Vol 1 p 4 Williams 11th Edn p 595

To substantiate the gift there must be actual delivery of the thing to the donee himself or to some one else for the donee's use—Ward \ Turner 2 Ves Sen 431 Drury v Smith 1 P Wms 404

A gift made in contemplation of suicide is not a valid donatio mortis causa as that would be against public policy—Agnew v Billast Banking Co (1896) 2 Ir R 204

Where the deceased a few hours before his death and in contemplation of death caused certain Government pap is to be fetched and himself gave them into the hands of the plainiff with the intention of passing the property to him but could not make the endorsem in because he was too weak to do so held that the circumstance amounted to a valid donatio mortis cousa—Kumar Upendra Krishia v Nobin Krishia 3 BLROC 113

## PART VII

### PROTECTION OF PROPERTY OF DECEASED

This Part (Lecs 192 210) deals with protection of property of the deceased. It is largely based on the Success on (Property Protection) Act 1841 (XIX of This Act was framed under the old system of drafting and certain slight verbal changes of language have neces arrly been made in introducing its provi sions in the consolidated Bill -Notes on Clauses

Section 1 Act XIX of 1841

Person claiming right by succession to property of deceased may apply for relief against wrong ful possession

(1) If any person dies leaving property, moveable or unmoveable, any person claiming a right by succession thereto, or to any property thereof, may make application to the District Judge of the district where any part of the property is found or situate

for relief, either after actual possession has been taken by another person, or when forcible means of seizing possession arc apprehended

Section 2 Act XIX of 1841

(2) Any agent, relative or near friend, or the Court of Wards in cases within their cognizance, may in the event of any minor, or any disqualified or absent person being entitled by succession to such property as aforesaid, make the like application for relief

Scope of this Part -Act XIX of 1841 (Corresponding to this Part) is designed to protect property but it is only to be used where exceptional grounds exist and prompt actions are necessary to guard against misappropriation waste or neglect of the estates of deceased persons-Khaja Autubuddin v Ahaja Fas uddin 2 NLR 72

The provisions of this Part should not be lightly resorted to. This Part is intended to meet the special circumstances mentioned in this section, and should not be nut in motion unless the existence of those special circumstance, has been clearly established-Japon v Monmohan 7 PR 1904 Where it was shown that the defendant had in a very high handed manner taken forcible possession of a furniture shop and there was every likelihood of his proceeding to greater lenaths unless abarply checked it was held that the District Judge was right in taking action under this Part Ghurku Mal v Durga Dett 65 PLR 1911 10 IC 820 (821) But where it was not shown that any person had taken possession upon any pretended claim of right or by force or fraud and there was no finding that the applicant would have been materially prejudiced by being compelled to bring a regular suit to establish his title the District Judge was wrong in taking proceedings under this Part but should have left the parties to eek their remedy by a suit-Sato v Gopal 34 Cal 929 (932) 12 CWN 65

This section applies only to persons claiming right by succession at does not apply to the case of a family governed by the Mitakshara Law, masmuch as in the case of the death of a member the property passes not by way of succession but by survivorship—Salo Koer v Gobal Sahu 34 Cal 929 (932) 12 CWN 65 So also it does not apply to the car of property held by the Karnavan of a Malabar tarward (whether the property is the tarward property or the self acquisition of the Karnavan) because the property lapses by survivorship and does not pass by succession—Abdulla v Mithur 23 MLJ 527 17 1C 429

The expression succession in this section is not confined to intestate succession but applies to testamentary succession a well—Benade Behary v Rai Sundan 53 Cel 637 30 C WN 500 (502) 94 IC 588 A IR 1926 Cd 779

Who can apply —Idols are entitled to make an application under this section and as the idols must act through some human agency shebaits can apply on their behalf—Benode Berary v. Ras Sundari (supra)

- 210 'Any portion thereof?' —This Part is not limited in its application to cases where disputes arise between persons each of whom claims title by succession to the entire estate but it covers a case in which the claim relates to the undivided share of the estate left by the deceased Therefore an application may be maintained when it is alleged by a person who claims a share in the estate left by the deceased that share has been seized by other persons in assertion of a pretended claim of right by gift or succession—Gopi Krishna v Ray Krishna 12 C.L.J. 8 6 S.I.C. 259 (261)
- 211 District Judge —The junsdiction created by this Part is vested in the District Judge. Where an application was made under this section to a Sub Judge acting as an Additional District Judge it was held that the Sub Judge had no junsdiction to deal with the application as there was no evidence to show that there was any general assignment of cases under Act AlX of 1841 to him by the District Judge. A mere private management between the District Judge and the Subordinate Judge should not seem as the former's Court were made over to the latter for disposal is not enough to give jurisdiction to the latter. So also a mere notification appointing a Subordinate Judge as an Additional Judge would not confer on the Additional Judge the power of a District Judge to try cases under Act XIX of 1841—Ganga Sahas v. Babu Lal 72 PR, 1918, 46 17 C 589 (591)
- Form of application -The application contemplated by this section is an application for relief asking the Court to determine who has the right to possession pending the final determination of the rights of the parties in a regular suit. If a person makes an application for an intentory of the estate of a deceased person and for the appointment of curator but makes no application for relief as stated above such an application is beyond the contemplation of the Act (se Act \IX of 1841) and the Court has no jurisdiction under the Act to entertain it-Haji Muhammadbhas v Bas Havabhas 26 Bom LR 145 AIR 1921 Bom. 507 In this case Macleod CJ commenting on Act XIX of 1811 observed as follows The Act is really out of date and there is no necessity whatever of parties claiming the estate of a deceased person to have recourse to it. The relief which is properly open to them is to file an administration suit and apply for the appointment of a receiver in which case the question will be who should be given possess on until the dispute between the parties has been decided in the suit. Then the Court can by an interlocutory order either appoint a receiver and so take the property into its own possession or it can allow any of the di-puting parties to have possession on such terms as We think considering the wide powers that are now it may think fit

given to the Courts to make interlocutory orders in regular suits that an application for relief under this Act should not be entertained. It cannot be said that any person is likely to be materially prejudiced (see 193) if he is told to file a regular suit because if he proceeds with ordinary diligence he can ask for relief of an interlocutory nature in that suit.

High Court's power of revision — Although no appeal or review is allowed from an order in summary proceedings by a District Judge under sec 192 yet there is nothing in the section or the Act which takes away the right of revision by High Court—Bua Dutta v Sahib Diyal A I R 1938 Lah 753

Section 3 Act XIA of 1841 193 The District Judge to whom such application is made shall, in the first place, examine the applicant on oath, and may make such further enquiry, if any as he thinks necessary as to whether there is sufficient ground for believing that the party in possession or taking forcible means for seizing possession has no lawful title, and that the applicant, or the person on whose behalf he applies, is really entitled and is likely to be materially prejudiced if left to the ordinary remedy of a suit, and that the application is made bona fide

213 Inquiry — In the preliminary stage contemplated by this section the Judge has merely to estatsly himself upon the declaration of the complainant and also upon the examination of the witnesses and documents if he deems necessary whether there are strong reasons for believing that the application is bona fide and that judicial action ought to be taken. This implies that an application made under this Act ought not to be granted as a matter of course but that the Court should proceed with caution and satisfy itself that there are sufficient grounds in support of a prima face case. If the Judge is satisfied that there are such prima face grounds he cites the party against whom the complaint has been made so that he may determine summanly the right to possession (see parts section)—Gopt Aristhay & Raf Arishna 12 CLJ 18 6 IC 259 (288)

This section contemplates an inquiry upon two points first whether the opposite party has lawful title and secondly whether the applicant is really entitled whether his application is bona fide and whether he is likely to be materially prejudiced if left to a regular suit. If the Court fails to make these inquiries its order will be liable to be set aside by the High Court in revision -Phul Chand v Asshmish 11 CL J 521 6 IC 630 (631) Tarak Chandra v Salva Charan 15 I C 504 (505) (Cal.) Ganga Sahai v Babu Lal 72 PR 1918 31 PLR 1918 46 IC 589 (591) Kothandarama v Jazathambal 16 LW 924 AIR 1923 Mad 229 To put the procedure prescribed by this Part in motion the title and bona tides of the applicant must be clear and an obli gation is imposed upon the Judge to satisfy himself by some inquiries that the party complained against has no lawful title to possession and that if the applicant were referred to a regular suit he would be a serious sufferer-Ram v Lal Cl and 138 PR. 1906 Jagop v Manmohan 7 PR 1904 Papamma v Collector 12 Mad 341 But it is not necessary that the District Judge should come to an express finding or record a finding that the applicant is likely to be materially prejudiced if left to the ordinary remedy of a regular suit. Although there be no actual finding in the e word still if the facts found by the Judge

sufficiently show that this question was present in his mind and he expressly refers to this section with regard to the application and he has found that the opposite party has taken away all the moveable properties left by the deceased th's finding is sufficient to maintain an application inder this section-Benode Belary v Rat Sunaart 53 Cal 637 30 CWN 500 (503) 94 IC 588 AIR 1826 Cal 779 If an application is made by a person under this Part basing his claim upon the directions contained in the will of the deceased proprietor for the possession of the property after his death the Court before it gives effect to those directions by putting the applicant in possession of the property should inquire whether the applicant has lauful title and for that purpose the Court should inquire whether the directions contained in the will (the validity of which is disputed) are legal directions or not. If the Court fails to do this the order is open to revision by the High Court-Gorakh Nath v Bishember 60 PR 1882 (FB) If any directions have been given by the deceased as to the disposal of his property the District Judge should inquire into them before passing any further order and should give effect to them in the summary proceedings taken under this section without considering the validity of those directions-Abdulla v Mitthur 23 MLJ 537 17 IC 429 (430)

Where the Court before issuing the citation (summons) under section 194 omtted to follow the procedure prescribed by the present section and to satisfy intelf whether the party in possession had any title but afterwards when the parties appeared it followed the procedure of this section and upon taking evidence arrived at the conclusion that the person in possession ought to be left undisturbed it was held that the procedure was substantially complied with —Rajn v Lai Chand 138 PR 1906 116 PLR 1908

The words enquire by solemn declaration occurring in sec. 3 of Act XIX of 1841 have now been substituted by the words examine the applicant

necessary Under the old Act it was that in the exercise of his judicial discretion the Judge was entitled to act upon the statements made upon solemn affirmation or affidant of the applicant under this section—Bhimappa valaments of 120 Jeps Krishna v Ray Krishna 12 C.L.J 8 6 IC 259 (262) so also a statement on solemn affirmation by the agent of a pardanashin ladi, was a sufficient declaration under this section—Ghuriu Mal v Dirga Devi 65 PLR. 1911 10 IC 820 (821) These cases would still hold good under the present Act

Examination of applicant — When a petition is made to the District Judge praying that the petitioner may be put in possession of certain property the Judge cannot throw out the application without first taking the deposition of the petitioner. In cases of this description it is ordinarily desirable that the preliminaries mentioned in this section should all be satisfied—Janki v. Ganga Prasad 1883 AWN 184. The District Judge must examine the petitioner in support of his application and should also examine the witnesses who are present to support the petitioner is case—Sato Acor v. Gopol 34 Cal 929 (933). This is now expressly provided by the words shall examine the applicant on oath.

214 Revision —Where an order under this Part has been made but the procedure pre-cribed by this section has not been followed it is competent to the High Court to interfere in revision—Phil Chand v Kishmish 11 CLJ 521 6 1 C 630 (631) Tanak Chandra v Satja Chanon 15 1 C 504 (505) The High Court should not ordinanly interfere on the revision set on cases under this Part but where an erroneous order has plainly been passed likely to prejudice a partly seriously and likely to cause serious embarrassment and difficulty in the future intervention is right and proper—Chanki v Durg Devis 65 PLR. 1911

10 FC 820 (821) Thus where the petitioner was not examined in support of his petition nor were the witnesses examined in support of the petition is case nor even the objector was allowed to examine his witnesses to disprove a most important allegation in the petition it was held that the District Judge acted illegally and with material irregularity in the exercise of his jurisdiction and the High Court would interfere-Sato Koer v Gopal 34 Cal 929 (933) 19 CWN 65 So also where it was urged that a part of the property in dispute did not belong to the deceased but was the property of the claimant and it appeared that the plea had not been fully and carefully dealt with the Chief Court in revision directed the Court to make full inquiry into the matter and pass order accordingly-Jagon v Manbohan 7 PR 1904 The order of a Di trict Court directing the taking of an inventory of the estate of a deceased per on under sec 194 is liable to be interfered with by the High Court under sec 115 C P C 1908 if such order does not conform to the requirements of sec 193 of this Act-Abdul Rahiman v Kutti Ahmed 10 Mad 68 Abdulla v Mirthur 23 MLJ 537 17 IC 429 (430) Where the order of the District Judge appointing a curator under sec 195 was pa sed on receipt of a report from the Collector under sec 199 and without examining the complainant or holding any inquiry as required by sec 193 held that the order was liable to be set aside under sec 115 C P Code-Arishnasami v Muthu Arishna 24 Mad 364

But the High Court will not interfere in revision unless it is satisfied that the person moving it has no other remedy open to him whereby he may obtain the relief sought—Ganga Sanai v Babu Lal 72 PR 1918 31 PLR 1918 46 IC 589 (592) following Jois Mai v Coates 80 PLR 1901 Where not only has the petitioner another remedy open to him but the has already availed himself of that remedy and has instituted a suit for the property in question the High Court will refuse to interfere—Ganga Sanai supra

Section 4 Act XIX of 1841 194 If the District Judge is satisfied that there is sufficient ground for believing as afore said but not otherwise, he shall summon

the party complained of, and give notice of vacant or disturbed possession by publication, and, after the expiration of a reasonable time, shall determine summarily the right to possession (subject to a suit as hereinafter provided) and shall deliver possession accordingly

Provided that the Judge shall have the power to appoint an officer who shall take an inventory of effects, and seal or otherwise secure the same, upon being applied to for the purpose, without delay, whether he shall have concluded the inquiry necessary for summoning the party complained of or not

215 The word summon has been substituted for the vord cite. The issue of citations by ordinary summons is not illegal—fagon v. Manmohan 7 P.R. 1904.

No order should be passed under this section a aimst a person without allowing him to be heard and adduce evidence in support of his petition—Sate Korr y. Gapal Salu. 34 Cal. 929 (933) 12 C.W.N. 65

The District Judge may dismiss an application if he is of opinion that the applicant has made a long delay in pressing the application and that consequently the case is not a suitable or advisable one for appointing a curator or for putting the applicant in possession-Sakharam v Vinayak 102 I C 622 A I R 1927 Nag 253 (255)

Scope of Enquiry -Under this section it is only necessary for the Court to consider whether the objector has any title and whether the claimant is really entitled to the property (see sec 193 also). The Court is required to decide the right of possession of the properties and to decide who among rival claimants has a preferential claim. But there can be no final decision so far as the question of title is concerned in a summary proceeding like this, in which the scope of the inquiry is restricted to the right of possession question of title can be finally decided only in a regular suit-Bhabatarini v Prafulla 30 C W.N 871 (873) 140 IS 376 A I R 1933 Cal 17 In Bhabatarini Debi's case (supra) Guha and Ghose JJ observed Reliance has been placed on behalf of the peutioner on the observations of their Lordship of the Privy Council in the case of Bhuguandeen Dobey v Myna Baee 11 MIA 487 that a Judge had in a case of the present nature no jurisdiction to determine questions of title, and could only deal with the right to possession. It is only necessary to state that the obvious meaning of the observation so made was that there could be no final dec.s.on so far as the question of title was concerned in a summary proceeding by the Judge in which the scope of enquiry was restricted to the right of possession subject to a regular suit in which the question of title as between rival claimants was to be be finally decided. This section in some respects stands in a similar position to section 145 Cr P Code but its scope is larger inasmuch as it embraces all properties moveable and immoveable and once for all it settles the right to hold possession of the property summarily directing the other disputants to seek their remedy in a proper Court-Biso Ram v Emp 23 Cr L J 236 (Pat )

Under the proviso the District Judge may direct an inventory to be taken before the conclusion of the inquiry se in the course of the inquiry but it does not mean that an order for taking inventory may be passed without any inquiry being talen under the preceding section. That section requires the Judge to commence the inquiry at once upon receiving the application and this inquiry cannot be dispensed with-Abdulla v Mirthur 23 ML J 537 17 IC 429 (430)

Security-if can be demanded -There is no provision in this section for demanding security from the p rson to whom the property is delivered. The substantive provision of law contained in this section cannot be controlled by O 32 r 6 C P Code-Bhabatarini v Profulla supra.

If it further appears upon such inquiry as afore- Section 5 said that danger is to be apprehended Art XIX of Appointment of cura of the misappropriation or waste of the tor pending determination of proceeding property before the summary proceed-

ing can be determined, and that the delay in obtaining security from the party in possession or the insufficiency thereof is likely to expose the party out of possession to considerable risk, provided he is the lawful owner, the District Judge may appoint one or more curators who e authority shall continue according to the terms of his or their respective

IC 248 (249)

appointments, and in no case beyond the determination of the summary proceeding and the confirmation or delivery of possession in consequence thereof

Provided that, in the case of land, the Judge may dele gate to the Collector, or to any officer subordinate to the Collector, the powers of a curator

Provided, further, that every appointment of a curator in respect of any property shall be duly published

216 Appointment of Curator — The necessary conditions subject to which a curator is to be appointed under this section are (1) there must be an application and an examination as directed by see 193 (2) the Judge must be in a position to say upon such application and examination that danger is to be apprehended of a misappropriation or waste of the property before the sum mary suit can be determined and (3) the delay in obtaining security from the party in posse sion or its insufficiency is likely to expose the party out of possession to considerable risk—Madan Gopal v Narbada 11 PR 1915 28

Where an application is made for the appointment of a curator in the ordinary nature of things it would be desirable then and their by summary inquiry to pass an order as to who should remain in possession or as to a curator being appointed and the hearing of the application should not be postioned till the disposal of other connected proceedings (e.g. probate proceedings) even though the parties themselves agree thereto—Sakharam v Vinajak 103 IC 622 AIR 1827 Nag 253 (254) The curator may be appointed even before the issue of the notice under see 194 and indeed in many cases it may be absolutely necessary to appoint a curator before the oppo tie party has had time to remove the assets—I lia v Mahange 54 All 183 (FB) 137 IC 634 AIR 1931 All 632 (634)

The Di trict Judge appointing a curator under this section is not required to record the grounds or the findings on which he is satisfied as to the conditions required by secs 193 and 195 regarding the appointment of a curator. All that is necessary is that he should be satisfied as to the existence of those conditions. Therefore the mere fact that the Judge simply states that in his opinion it was necessary to appoint a curator but does not specifically set forth the grounds on which he was so satisfied does not invalidate the appointment of the curator if in a subsequent order he has made it clear that he is satisfied by the evidence of the applicant as to all the grounds—Lifa v Mahange 54 All 183 (FB) 137 IC 634 All R 1931 All 632 (634 635). The Pumpa Chit Court however expressed the view that there must be a clear finding that danger of misopropriation is really to be apprehended. There must be evidence on the record to the effect that the other party is likely to misopropriate the property. A mere statement by the Judge that misopropriation of property is to be apprehended is not sufficient—Madeas Gebel v Norbola upica.

Moreover the District Judge should ask the party in possession to give security before the can appoint a curator. It is only when that party makes delay in furnishing security or the security is found to be in ufficient that the Judge can pass an order for the appointment of a curator. Where the party in possession was never asked to give any security the Judge sorder of appointment of curator is hable to be set aside—Madda Gopal v Narhada surra.

A curator appointed under this section is not a person claiming to be entitled to the effects of the deceased person whose estate he is appointed to manage within the meaning of sec 4 of the Succession Certificate Act 1889 (sec 214 of the presnet Act) and he is therefore not required to take out a certificate under that Act before he can sue or obtain a decree The curator is not a representative of the deceased person but is merely entrusted by the Court with certain powers over the estate for a temporary purpose amongst which is the power to sue in his own name given him by sec 200. The curator exercises his authority until a succession certificate (or probate or letters of administration) has been obtained and as soon as it has been obtained his powers cease (sec 197)—Babasab y Narsapha 20 Bom 437 (438)

Although the proviso lays down that the term of the appointment of a curator shall not be beyond the termination of the summary proceeding still until the curator has handed over possession of the property his appointment does not come to an end even though the summary proceeding has been terminated and therefore he can institute a suit under see 200—Lakhim Chand v Ran Lal

133 IC 414 AIR 1931 All 423 (424)

196 The District Judge may authorise the curator Section 6 Act XIX of Severs conferable on to take possession of the property 1841 curator either generally, or until security is given by the party in possession, or until inventories of the property have been made, or for any other purpose necessary for securing the property from misappropriation or waste by the party in possession

Provided that it shall be in the discretion of the Judge to allow the party in possession to continue in such possession on giving security or not, and any continuance in possession shall be subject to such orders as the Judge may issue touching inventories, or the securing of deeds or other effects

197 (1) Where a certificate has been granted under Section 28 Prohibition of exercise of certain powers by curtors. Payment of or letters of administration has been made, a curator appointed under this Part shall not exercise any authority lawfully belonging to the holder of the certificate or to the executor or adminis-

trator

(2) All persons who have paid debts or rents to a curator authorised by a Court to receive them shall be indemnified, and the curator shall be responsible for the payment thereof to the person who has obtained the certificate, probate or letters of administration as the case may be

This clause is taken from section 23 of the Succession Certificate Act, 1889 but which, as it limits the power of the curator appropriately falls in this Part of the consolidated Bill —Notes on Clauses

See 20 Bom 437 cited under sec 195

(SEC. 199

198 (1) The District Judge shall take from the cura tor security for the faithful discharge 212 of his trust, and for rendering satis factor) accounts of the same as heremafter provided, and may authorise him to receive out of this and man tocare the property such remunctation, in no case exceeding five per centum on the moveable property and on the annual remuneration. profits of the immortable property, as the District Judge

- (2) All surplus money realized by the curator shall be paid into Court, and invested in public securities for the thinks reasonable pane into court, and invested in page 300 and the benefit of the persons entitled thereto upon adjudication of
  - (3) Security shall be required from the curator with all reasonable despatch, and, where it is practicable, shall be the summary proceeding taken generally to answer all cases for which the person may be afterwards appointed curator but no dealy in the taking of security shall prevent the Judge from immediately in vesting the curator with the powers of his office

The words moveable and immoveable have been substituted for the words personal and real-Notes on Clouses

Section 8 Act XIX of 1841

4

(1) Where the estate of the deceased person consists wholly or in part of land to Government, in all matters regarding the propriety of summoung the party in possession of appointing a curator, where estate includes revenue paying land

or of nominating individuals to that appointment, the Disor or nonmacing menvious or that appointment, the District Judge shall demand a report from the Collector, and the Collector shall the eupon furnish the same

Provided that in cases of urgency the Judge may procced, in the first instance, without such report (2) The Judge shall not be obliged to act in conformity

with any such report but, in case of his acting otherwise than according to such report, he shall immediately forward than according to such report, he shall anniculately to ward a statement of his reasons to the High Court, and the High a statement of mis reasons to the right court, and the right Court, if it is dissatisfied with such reasons, shall direct the Judge to proceed conformably to the report of the Collector

The words High Court have been substituted here and in other places in The words High Court have been substituted here and in other places in this Part where they occur for the words Court of Sadar Diwani Adalat ......Notes on Clauses

200 The curator shall be subject to all orders of the Section 9
Institution and defence of suits.

District Judge regarding the institution 1841 or the defence of suits, and all suits may be instituted or defended in the name of the curator on behalf of the estate

Provided that an express authority shall be requisite in the order of the curator's appointment for the collection of debts or rents but such express authority shall enable the curator to give a full acquittance for any sums of money received by virtue thereof

216A Sut by curator —This section does not require that the curator must be specially authorised by the Distinct Judge to institute or to defend suits What this section states is that the curator shall be subject to all orders of the Distinct Judge The words express authority in the proviso relates to the collection of debts or rents and not to the institution of suits. Consequently no special authority of the Judge is required for the curator to institute a suit on bchalf of the estate—Lakhmi Chand v Ram Lal 133 IC 414 AIR 1931 All \$23 (424)

See also 20 Born, 437 cited under sec 195

201 Pending the custody of the property by the section 10 Allowance to apparent curator, the District Judge may make Act XIX of such allowances to parties having a brumary investigation of the rights and circumstances of the parties interested he considers necessary, and may, at

the parties interested he considers necessary, and may, at his discretion, take security for the repayment thereof with interest, in the event of the party being found, upon the adjudication of the summary proceeding, not to be entitled thereto

202 The curator shall file monthly accounts in Section II Accounts to be filed by abstract, and shall on the expr y of each 1841 period of three months, if his administration lasts so long, and upon giving up the possession of the property, file a detailed account of his administration to the satisfaction of the District Judge

203 (1) The accounts of the current shall be open Section 12
Inspection of accounts and inght of interested party to keep diplicate separate person to keep a duplicate account of all receipts

and payments by the curator,

(2) If it is found that the accounts of the curator are in arrear, or that they are erroneous or incomplete, or if the cui ator does not produce them whenever he is ordered to do so by the District Judge, he shall be punishable with fine not exceeding one thousand rupees for every such default

Section 13 Act XIX of 1841 204 If the Judge of any district has appointed a Bar to appointment of second curator for same property of a deceased person, such property and property the full property that property the full property.

of any other district within the same province from appointing any other curator, but the appointment of a curator in respect of a portion of the property of the deceased shall not preclude the appointment within the same province of another curator in respect of the residue or any portion thereof

Provided that no Judge shall appoint a curator or entertain a summary proceeding in respect of property which is the subject of a summary proceeding previously instituted under this Part before another Judge

Provided, further, that if two or more curators are appointed by different Judges for several parts of an estate, the High Court may make order as it thinks fit for the appointment of one curator of the whole property

Preference of sole to joint administration -It is well established according to the English cases that the Court should prefer a sole to a joint administration and even where several persons stand in the same degree of kinship to the deceased at as the rule to select one only the selection being made according to certain recognized principles. The interest of the estate which has to be administered and the interests of the parties entitled thereto must be primarily looked to and other things being equal a person with business experience and capacity will be preferred to one tho has none. A son as a rule will be preferred to a daughter and where none of the usual tests can be applied the Court frequently appoints the applicant who is first in the field. Where the applicants for administration are quarrelling between themselves and are antagonistic to each other the administration of the estate is likely to suffer. As they must act jointly one of them if obstinate could defeat the proper administration of the estate This has also undoubtedly been held to be the practice in this country where administration has frequently been refused to more than one person even where the claimants by reason of kinship are equally entitled to it-Stoney v Stone; 2 Pat 508 72 I C 811 A I R 1923 Pat 348

Section 14 Act XIX of 1841 205 An application under this Part to the District
Limitation of time for Judge must be made within six months
application for curator of the death of the proprietor whose
property is claimed by right in succession

217 It is not necessary to bring the operation of this section into play that the succession should be claimed from the last deceased proprietor k a representative Vatandar of a Deshgat Vatan having died in 1892 his widow Bs name was entered on the register as a representative Vatandar and she held the property until her death which took place in 1907. Within six months of Bs death the applicant claiming to be the nearest heir of K applied for possession of the property under Act XIX of 1841 It was contended that the application could not be entertained under this section for K had died more than six months before the date of the application Held overruling the contention that the decease of the proprietor whose property is claimed by right in succession referred to in this section would include the decease of B in this case for B was bety een the death of K and her own decease the proprietress of the property which was claimed and it was claimed in succession to her ie the claimant claimed to succeed her in the possession of the property. The words by right in succession in this section are chosen to describe the point of view of the Judge and not the point of view of the interested parties. All that the Judge has to decide is who should be put into possession of the property in succession to the last deceased holder-Bhimappa v Khanappa 34 Bom 115 (119) 11 Bom L R 1308 One P died in 1899 feaving a will under the provi sions of which his widow hould remain in possession of the properties for her life and after her death the properties would vest in two idols. The widow died in 1924 and within six months after her death the idols made an application through the shebait for the possession of the properties which had been wrong fully taken possession of by the opposite party. It was contended by the opposite party that the application was incompetent as it was not made within six months from the death of P from whom the succession can only be claimed Held that the application was maintainable-Benode Behary v Ras Sundars 53 Cal 637 30 CWN 500 (502) 94 IC 588 AIR 1926 Cal 779 (following 34 Bom. 115 cited supra)

Nothing in this Part shall be deemed to authorise Section 19 206

Bar to enforcement of Part against public settle ment or legal directions by deceased

the contravention of any public act of Act XIX settlement or of any legal directions 1841 given by a deceased proprietor of any

property for the possession of his property after his decease in the event of minority or otherwise, and, in every such case, as soon as the Judge having jurisdiction over the property of a deceased person is satisfied of the existence of such directions, he shall give effect thereto

Nothing in this Part shall be deemed to authorise Section 16 207 any disturbance of the possession of a Act XIX

Court of Wards to be made curator in case of minors having property subject to its jurisdiction

Court of Wards of any property, and in case a minor, or other disqualified person whose property is subject to the

Court of Wards, is the party on whose behalf application is made under this Part, the District Judge, if he determines to summon the party in possession and to appoint a curator,

shall invest the Court of Wards with the curatorship of the estate pending the proceeding without taking security as aforesaid and if the minor or other disqualified person, upon 246 the adjudication of the summary proceeding, appears to be entitled to the property, possession shall be delivered to the

Section 17 Act VIV of

208 Nothing contained in this Part shall be any impediment to the bringing of a suit either Court of Wards by the party whose application may have been rejected before or after the summoning of the party in possession, or by the party who may have been exicted from the possession under this Part

Section 18 Act XIX of 1841

The decision of a District Judge in a summary Effect of decision of proceeding under this Part shall have no other effect than that of settling the actual possession but for this purpose it shall be final, and summary proceeding

shall not be subject to any appeal or review No appeal No appeal hes against the decision of a District Judge 218 No appeal No appeal us against the decision of a Lyistrict Judge dismussed an application for under this Part. Thus where the District Judge dismussed an application for under this rart areas where the District Judge distinssed an application for account of the delay of the applicant to produce his appointment of a curator on account of the netary of the apparent to produce the order of dismissal is not appealable—Gajadhar v Megha 44 All 546

219 Revision —Although the order of a District Judge under this Part XIV Kevision \_\_\_\_Annough the order of a Listing judge under rins ration of open to any appeal or review such an order is subject to revision. is not open to any appeal or review such an order is subject to revision. Softharism v Vina) ok 102 IC 622 AIR 1927 Nag 253 (255) But the High Sornaram v vinasar int i box Air int nag 53 (50) but the right COURT WILL NOT INTERFERE IN PRIVISON UNIESS IT APPEARS THAT THE LABORITOT JUDGE HAS

[ailed to exercise any jurnsdiction tested in him or has exercised a discretion lailed to exercise any jurisdiction vested in him or has exercised a discretion of vested in him or has otherwise acted illegally or with material irregularity. not vested in him or has otherwise acted megany or with material irregularity in the exercise of his jurisdiction—Blabbutetini v Profails 35 CWN \$71 (873) in the exercise of his jurisdiction—snabatarini v Frajulia 30 CWN 871 (873)

ATR 1933 Cal 17 Sakharam v Vine) ok supra The High Court should not AIK 1965 Lat 17 Sakharem V vina) as supra Ine High Court should not ordinarily interfere on the revision side in cases under this Part, but where an ordinarily interiere on the revision side in cases under this Fart, but, where an errontous order has plainly been passed, likely seriously to prejudice a party and erroneous oroer mas planny ocen passer meny senously to prejudice a party and hardy to cause senous embarrassment and difficulty in the future intervention is hacty to cause serious embarrassment and amounty in the luture intervention is might and proper—Ghunks \ Darge 65 PLR 1911 10 IC 820 (821) The right and proper—Ghures \ jumps to PLK 1911 to 10 to 500 (564) fire High Court will interfere where the District Judge has acted illegally and with HIGH COURT. WHI INTERFECT WHERE THE LINEARITY HUNGER HAS BLUEST HERBARY AND WHITH A COURT WHILE HERBARY AND WHITH A COURT HAS A COURT HOLD WHITH A COURT HAS A COU material irregularity in the exercise of ms jurisorction—300 v Copul 39 final 929 (933) 12 CWN 65 The order which this section declares to be final Is intended to be a legal order and so a totally illegal proceeding of order would. is intended to be a legal proper and so a locally suegal procedurity or order would always be subject to revision by the High Court. But where the District Court aways De subject to revision by the right out. But white the District Out. the secretised its power legally then however erroneous the procedure of however. has exercised its power regary then nonever extended in procedure of nonever in unjust or improper its order the High Court has no power to interfer in unjust or improper its order one rii, it court has no power of interfere in revision. Ahaya Kutbuddan v Khaja Fattuddan 2 N.I.R 72 It is true that revision. A sage Autonomaun v Annya rannamin e 1945 (e it is true una this section does not bar the junishirtion of the High Court to interfere with a thus section goes not bar the junisdiction of the High Court to interrier with a decision passed by the District Judge without introduction e g a decision passed decision passed by the District Judge without introduction e g. a decision passed decision passed by the District Judge without introduction e g. a decision passed by the District Judge without introduction e g. a decision passed by the District Judge without introduction e g. a decision passed by the District Judge without introduction e g. a decision passed by the District Judge without introduction e g. a decision passed by the District Judge without introduction e g. a decision passed by the District Judge without introduction e g. a decision passed by the District Judge without introduction e g. a decision passed by the District Judge without introduction e g. a decision passed by the District Judge without introduction e g. a decision passed by the District Judge without introduction e g. a decision passed by the District Judge without introduction e g. a decision passed by the District Judge without introduction e g. a decision passed by the District Judge without introduction e g. a decision passed by the District Judge without introduction e g. a decision passed by the District Judge without introduction e g. a decision passed by the District Judge without introduction e g. a decision passed by the District Introduction e g. a decision passed by the District Introduction e g. a decision passed by the District Introduction e g. a decision passed by the District Introduction e g. a decision passed by the District Introduction e g. a decision passed by the District Introduction e g. a decision passed by the District Introduction e g. a decision by the g. a decision passed by the District Introduction e g. a decision passed by the g. a decision passed by the District Introduction e g. a decision passed by the accusion passed by the libraric judge without influence of a accusion passed without inquiring whether the applicant had a lawful title it is also true that without inquiring whether the applicant han a lastiff the first and true in the terms of sec. 115 C. P. Code 1908 are sufficiently wide to give the High Court. nne terms of sec. 113 6 r. Cade 1230 are sunficiently wide to give the High Court jurisdiction to reive a decision passed by a Court under this Part—Gorakh Nath v Bishembar 66 P.R. 1882 (F.B.) But it should be noted that see 115 C. P. Code is directed against cases in which the question of partialction is involved Where there has been no assumption of or failure to exercise jurisdiction and no illegality or material irregulantly in the exercise of jurisdiction but at the most the District Judge has made a mustake in law see 115 cannot apply and the High Court cannot interfere in revision. The remedy of the applicant is by way of a suit to set aside the District Judge's order—Courishonker v Debiprasod ATR 1829 Nag 317 (318) 120 IC. 401

See also Note 214 under sec 193

Appointment of public curators for any district or number of Act XIX of districts, and the District Judge having jurisdiction shall nominate such public curators in all cases where the choice of a curator is left discretionary with him

under this Part

PART VIII

PRI SI NTATIVI TITIL TO I ROLLREY OF DECLASED

#### on succession

This is an important portion of the Bill which deals with title to the property of the deceased. It is only by separating these provisions of the law that a clear view can be obtained of the requirements of the Indian law as to grants by the Court in the case of the estate of a deceased person. By separating the law in this manner the consolidation of those provisions of the law relating to probate and grant of administration which are now contained in the Indian Succession Act (X of 1865) and the Probate and Administration Act (Y of 1881) are rendered possible —Notes on Clouses

With reference to this Part of the Bill it will be observed that the arrange ment of the clauses brings out very clearly the anomalous position in the Indian law with regard to the requirements of proof of representative title to the property of a deceased person —Ibid

Section 179 Act X of 1865 Section 4 Act V of 1881 211 (1) The experiment of executor or ad ministrator as such the vests in him as such

(1) The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person

(2) When the deceased was a Hindu Mahammadan, Buddhist, Sikh or Jaina or an evenified person nothing herein contained shall vest in an executor or administrator any property of the deceased person which would otherwise have passed by survivorship to some other person

This clause reproduces sec 179 of Act V of 1865 subject to the proviso in the case of survivorship for those classes of persons who are provided for by sec 4 Act V of 1881—Notes on Clauses

220 Scope of section —Section 179 of the Indian Succession Act 1865 (which corresponds with the present section) did not apply to an executor under a Hindu will before the Hindu Wills Act came into force such an executor was not in the same position as an English executor under an English will. The property did not vest in him. His position was analogous to that of the manager of an infant heir under the Hindu law. Saral Chandrar v Bhuperdria 25 Cal. 103 (105) Administrator General v Prem Leal 25 Cal. 788 (795) (PC) Amulya Chanan v Asil Das 32 Cal. 861 (870) Kherodemonty Durgamonel, 4 Cal. 4.54 (468) After the paising of the Hindu Wills Act this section was mad applicable to Hindus (in the Province of Bengal and the towns of Bombay and Madraly) by sec 2 of that Act and a Hindu executor was placed on the same footing as an English executor—Administrator General v Prem Leal 25 Cal. 788 (796) (PC) But the Probate and Administration Act again altered the law and made thus section inappli able to Hindus by deleting

section 179 from sec 2 of the Hindu Wills Act (See sec 151 Probate and Administration Act). Although ecc 4 of the Probate and Administration Act contained a provision similar to sec 179 of the Indian Succession Act 1885 that section contained a provision saving the ri<sub>o</sub>hts of the members of a joint Hindu family. And this provisio has been reproduced in sub-section (2) of the present section.

221 Property vests in executor or administrator —As regards the executor he derives his title from the will and immediately upon the testa tors death his property vests in the executor for the law knows no interval between the testators death and the vesting of the property. But the position of the administrator is different from that of the executor. The former derives his title wholly from the Court he has none until the letters of administration are granted and the property of the deceased vests in him only from the time of the grant—Raja Rama v Fakruddin 53 Mad 480 58 MLJ 210 ATR 1930 Mad 218 (219) 122 IC 504

All the property of the deceased —The words all the property of the deceased must be constitued as meaning the actual property of the deceased whether held by him for his own ben fit or for the benefit of others—Midnapore Zamindary Co. Ltd. v. Rain. Kanas. 5 Pat. 80. 91 IC 169. ALIR. 1926 Pat. 130. (134). 7 P.L.T. 188. The expression property of the deceased does not mean property of other persons vested in him as executor or administrator of those persons. That is property held by the testator in trust or as executor or administrator does not vest in his executor. Therefore the executor of an executor is not derivative executor of the original testator—De Sou a v. Sceretury of State 12 B.L.R. 423 (428). An executor as such his no title to the property which did not belong to the testator or which he had no right to dispose of The title of the executor is only a representative title to the property which belonged to the testator and over which he had a disposing power—Behary Lall v. Juggoo Mahun 4 Cal. 4 (21. (5).

Probate or Letters of Administration as to estate of deceased, if can be limited to part only —. Where the whole estate of the deceased vests in an executor under this section the Court cannot grant probate limited to part of the estate—In re Ticker Madhaby 6 Bom 460 (462) Similarly an administrator represents the entire property of the deceased and not a part of it. Thus where A one of the bers of the deceased originally obtained possession of the property with a view to collect the rents on beh. If of himself and his to hers C and D but later on set up an adverse title claiming the whole property whereupon B was appointed administrator at the instance of C and D it was held that B represented the entire estate and not merely the shares of C and D and as such he was entitled to be in possession of the whole property for the purposes of administration—Robson v Adm Gen 30 PLR 503 AIR 1892 Lah 753 (756)

Where letters of administration are granted to the Administrator General all the property of the deceased vests in him although the Administrator Generals Act does not contain express provision to that effect—Aluar Chetti v Cliidambara 38 Mail 1134 (1138) 27 M.L.J. 400. 26 I.C. 792

Effect of vesting of legal character —An executor or administrator by urtue of his office or in other v ords in the character of executor or administrator takes an extate in the property of the decae of and a legal character is vested in him. The property of the decaesed ve ts in the legatee for purposes of enjoyment but it vests in the executor for the purpose of administration. An

executor is therefore competent to maintain a suit for the recovery of a debt due to the estate of the deceased even after the death of a sole legates—Adov v Bibs Ram o 2 PLT 30s 60 IC 350 (351) Where a residuary legate is granted a probate he becomes the legal representative of the deceased for all purposes and all the property vests in him under this section. He can therefore recover the debts due to the deceased even though the will does not expressly empower him to collect the debts—Ishar Kaur v Amar Nath 146 IC 515 AIR. 1933 Lah 740

But in the absence of acceptance of office by the executor the property does not vest in him under this section—Roja Parthasarathy v. Rojah Venkatadri 46 Mad 190 (225) 43 MLJ 486 ATR 1922 Mad 457 70 IC 689 If an executor applies for probate he must be taken to have accepted the office of executor and he becomes the legal representative of the deceased testator and the property of the deceased vests in him as such—Kandosami v. Minugapha 16 MLT 547 26 IC 472 (474) Rojah Parthasarathy v. Rajah Venkatadri (supra). In the case of a Muhammadan will the executor is placed in posses son of the entire property belonging to the deceased testator and not merely of one third of the property over which alone the testator had a power of disposition. But of course the executor is an active trustee in respect of one third of the properties for the purposes of the will and a bare trustee for the heirs as to two thirds when he has realised the estate—A imministence v. Sirdar Ah 29 Bom LR 434 102 IC 129 ATR 1927 Bom 387 (391) following Kurtutulan v. Nikobatadokala 33 Cal 116 (128) (PC)

As the property of the deceased vests in the executor any suit sought to be filed against the estate of the deceased must be instituted against the executor only and not against any other person even if such person be the heir of the deceased. Thus a suit filed against the widow treating her as the legal representative of her deceased husband (a non Indian Christian) was held to be incompetent when it was found that the deceased had made a will wherein persons other than the widow were appointed executors—Administrator General v. Chettyat Firm 5 Rain 742 109 IC 444 AIR 1928 Raing 30 (34)

From the statement that the property of the deceased vests in the executor or administrator it follows that the executor or administrator can do everything which the deceased could have done and can therefore promise to pay the time barred debts of the deceased—Pestonije v Bay Meherbas 30 Bom LR 1407 112 IC 740 AIR 1828 Bom 539 (544)

While the property is vested in the executor even though it may afterwards be found to have been wrongly so vested as in the case of a forged will all the acts of the executor in respect of such property must be regarded as valid. But of course outsiders (e.g. purchasers) who have to deal with the executor on the faith of the property being vested in him must be protected they have got a personal remedy against the executor—A munimissa v Sirdar Ali 29 Bom LR 431 A1R 1927 Bom 387 (392) 102 IC 129

Meaning of "as such" —Section 211 merely provides that the eviate of a decrased person vests in his execution or administrator as such these words as such are important and show that the vesting is not of the beneficial interest in the property but only for purposes of representation. In a case of intestate succession it does not admit of any doubt that the beneficial interest vests in the heir at law and there is nothing in the Succession Act which limits the power of dispo all of the heir at law over such estate merely because a grant of administration has been made. Nor does the Transfer of Property Act make the interest of the heir at law in the estate property which may not

be transferred Section 216 and other provisions of the Succession Act only provide for representation of the deceased sestate for purposes of administration and are not intended for cutting down the rights of the beneficiaries—Kuluanta Beua v Katamichand 43 CWN 4 68 CLJ 8 AIR 1938 Cal 714

Vesting in executor before probate -The executor repre sents the estate (and can collect assets or sell property) even before he has taken out probate. The executor derives his title from the will and not from the probate-Shaik Moosa v Shaik Essa 8 Bom 241 (255) Mathuradas v Goculdas 10 Bom 468 (477) Mahomed \usuf v Hargor andas 47 Bom 231 (238) 24 Bom L R 753 Narandas v Narandas 31 Bom 418 (428) The executor derives his title from the will and not from the probate and he repre sents the estate of the testator from the time of his death before probate of the will is taken out. He can therefore dispose of the property of the testator with out taking probate-Meghray : Krishna Chandra 46 All 286 (289) Munisami v Maruthammal 34 Md 211 (214) Ganapaths v Sseamalas 36 Mad 575 Chidambara v Krishnasami 39 Mad 365 (373) Under this section all the property of the deceased vests in the executor as such Probate is not necessary to make a person an executor his title is derived under the will. There is nothing in this Act to prevent the executor from acting as executor and exer cising the powers given to him under the Act without obtaining probate-Gana paths v Sivamalas 36 Mad 575 (577 578) In two cases of the Calcutta High Court it was remarked that the vesting was to follow upon the grant of probate of the will in the case of the executor in the same manner as it followed the grant of letters of administration in the case of an administrator-Sarat Chandra v Bhupendra 25 Cal 103 (106) Behary Lalf v Juggo Mohun 4 Cal 1 (5) But these two cases were decided in respect of a will made by a testator who died before the passing of the Probate and Administration Act

In England also it has been said that the probate is merely operative as the authenticated evidence and not at all as the foundation of the executors tutle for he derives all his interest from the will itself and the property of the deceased vests in him from the moment of the testator's death—Smith v Miller 1 TR 475 (480) Combers Case 1 P Wims 765 Woolley v Clark 5 B & A 744 The grant of a probate does not give him his title it makes his title certain—Heuson v Shelley [1914] 2 Ch 13 The executor derives his title from the will and it follows that before and without obtaining probate he may do most things that appertain to his office thus the may take possession of the testator's property he may pay or take releases of debts owing from the estate he may receive or release debts which are owing to it—Williams 11th Edn P 213 See Note 228 under see 213

Liability of Executors for rent — Executors of a deceased lessee who have not entered into possession are nevertheless hable for the rent to the extent of any assets of the testator which may have come into their hands. As for an executor who has entered upon demised premises he over and above such liability in his representative capacity is also personally liable for the rent the lessor has then an opton to sue him in either capacity— Maharapadhray Kameshuar Simple v Phoresta Merusani Nanabhoy 40 C WN 390 165 IC 1980.

223 Sub section (2)—An estate which passes by survivorship to another person does not vest in the executor—Ban Harkor v Manekkal 12 Bom 621 (623) The effect of this sub section is to prevent the vesting of the property which would have passed by survivorship to some other person and which the testator had therefore no right to bequeath at the time of his death. Survi

deceased fathe

vorship has the effect of rendering a will invalid with re-pect to property which the testator could not dispose of at the time of his death-Bodi v Venkala swams 38 Mad 369 (373) In an undivided family when a co-parcener dies, there are no effects or property of his to which the surviving co parceners can succeed as his heirs but they take the whole of the family property by survivor ship. They are not therefore bound to take letters of administration for any e tate or effects of the deceased because there was not such estate which could be called his-Collector of Ahmedabad v Saichand 27 Bom 140 (144 145) Debendra v Surendra 5 PLJ 107 (118) 1 PLT 19 54 IC 807 Kalı Kumar v Nulabate 70 I C 155 A I R 1923 Pat 96

But where the property (e.g. certain shares in a Bank) was the exclusive and separate property of the deceased and upon his death it devolved upon his son who was the sole surviving co parcener of the family held that there was no survivorship in the strict sense of the term and the son was bound to take out letters of administration before he could apply to the Bank for the transfer of those shares to his name-Bank of Bombay v Ambalal 24 Bom 350 (357)

Section 190 Act > of 1865

(1) No right to any part of the property of a Right to intestates person who has died intestate can be established in any Court of Justice, property unless letters of administration have first been granted by a Court of competent jurisdiction

S 331 Act X of 1865 S 3 Act VII of 1901

(2) This section shall not apply in the case of the intestacy of a Hindu Mahammadan, Buddhist, Sikh, Jama or Indian Christian

Sub section (1) -This section does not mean that letters of administration must be obtained by the administrator before he can institute a suit to establish his right to the property of the deceased. It is sufficient if the letters are obtained before the decree is passed in the suit and the Court in which the suit is instituted will suspend the operation of any decree which it may pass until letters have been obtained-Ma San v Ma Chit AIR 1930 Rang 219 (221) 137 IC 381

The only person who is legally entitled to deal with the property of an intestate governed by the Indian Succession Act is the properly constituted admini trator of the estate that is a person who has obtained letters of administration to such property. Therefore a decree obtained against an heir of a deceased intestate (a Christi n) in po session of part of the estate who has not obtained letters of administration is inoperative as against the estate of the deceased and does not confer any title upon the decree holder in respect of the proceeds of the sale held in execution of such decree a against a person who has obtained letters of admin tration to the estate of the deceased; and a suit by the decree holder for the recovery of such sale proceeds paid over to the lecally constituted administrator of the estate is not maintainable.-Sukh Nandan Nennick 4 All 192 (194 105) A Parsi died intestate leaving a widow three daughters and two sons. The sons managed the e tate and collected the rents and outstandings due to the estate without of administration, Letters were however obtained by the widow, but they were limited to the extent of th t in the the sons brought a suit against his broth isters for rec in sum which he alleged to be due to of money

when he was alive Held that the suit could not be maintained as the estate wa unrepresented because neither the plaintiff nor his brother nor his sisters had taken out letters of administration in respect of the deceased s whole estate and the letters of administration taken by the widow and the daughters which were limited to only such shares in the estate as they were entitled to were not such as are contemplated by this section—Framji v Adairi 18 Bom 337 (340)

This section is plainly limited to a suit in which a person seeks establish a right to a part of the property of a deceased intestate such a suit would ordinarily be one to recover a specific part of that property or a suit to be paid a certain amount as an heir or as a person otherwise entitled to succeed to a part of the estate But it does not apply to a suit where a creditor of the deceased intestate seeks to recover his debt from the legal representatives of the deceased Therefore this section does not apply to a suit brought by a mortgagee for sale against the heirs of the deceased mortgagor-Ratanbas v Naray and as 51 Born 771 29 Born LR 900 104 IC 794 AIR 1927 Born 474 (476) So also this section does not apply to the case of the heirs of a judgment debtor applying to set aside a sale on the ground of material irre gularity In an application to set aside a sale the applicants do not want to establish their right to the property sold but are trying to bring the property back to their estate by having the sale set aside. Therefore the legal repre sentatives of a judgment debtor dving intestate can proceed with the application filed by him for setting aside the execution sale without obtaining any letters of administration to the estate-Smith v Gokul Chandra 11 Pat 424 13 PLT 457 AIR 1932 Pat 234 (235 236) 139 IC 74

Section 212 would not be a bar to a suit if the case is covered by sec. 304 That is if the heirs of the deceased intermedile with the estate of the deceased in such a manner as would make them executors de son tort a creditor of the deceased is entitled to sue them under sec 304 and they cannot resist the suit under sec. 212 on the ground that letters of administration have not been taken to the estate of the deceased—Ratanbay v Narayandas (supra).

225 Sub section (2) — Since this section does not apply to Hindus it is not obligatory on a Hindu heir to obtain letters of administration to the estate of the decea ed—JogenIrá v Apurna 13 CW N 1190 (1196) 3 IC 889
The same is the case with Cutchi Memons who are Mahomedans and to whom this Act does not therefore apply—Hay Oosman v Haroon Saleh Mahomed 47
Bom 369 (384) 68 IC 682 AIR 1923 Bom 148 Laren Christians are Native (Indian) Christians and sub section (1) is imapplicable to them—Ha Ann Thu v Ma Shue Mi 4 Burl 1 76 AIR 1925 Rang 233 88 IC 609
This section does not apply to a Burmees Buddhist such a person is governed by the Burmees Buddhist Law. But a Chinese Buddhist (domiciled in Burma) is governed by the Indian Succession Act and not by the Burmees Buddhist law consequently sub section (1) of this section applies to his case—Ma San v Ma Chit AIR 1930 Rang 219 (220) 127 IC 381 following Phan Tipok v Lm Kijn 8 Rang 57 (FB) AIR 1930 Rang 219 (230) 127 IC 381 following Phan Tipok v Lm Kijn 8 Rang 57 (FB) AIR 1930 Rang 219

225A Life Insurance Policy payable to executors—Although under see 212 (2) the grant of letters of administration is not essential in the case of a Hindu mitestacy still where an Insurance Company supulates that the money due under the policy will only be paid to the assured or his executors administrator or assigns, the right of persons entitled to claim the policy money in the absence of uch grant cannot be recognised—Gersham Life Insurance Society V Collector of Elauah 51 All 1005 30 A.L.J 1015 1shutosh v Protop Chandra 10 C.N.N. 1237.

225B Administrators —The word administrators in policies of insurance cannot be read so as to include those who are releved of the necessity of taking out letters of administration by reason of the provisions of sec 212 (2)—Ashittosh v Protap Chandra 40 CWN 1247

Section 187 Act X of 1865 Sec 2 (1) Act VIII of 1903 Right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in British India has granted probate of the will under which the right is claimed, or has granted letters of administration with the will or with a copy

Section 331 Act X of 1865 Section 2 Act XXI of 1870 (2) This section shall not apply in the case of wills made by Mahammadans, and shall only apply in the case of wills made by any Hindu, Buddist, Sikh or Jana where such wills are of the classess specified in clauses (a) and (b) of section 57

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Amendment —Sub section (2) has been amended by the Indian Suc cession Amendment Act XVII of 1929 This is merely consequential upon the amendment made in sec 57 of the same Act See Ga ette of India 1929 Part V p 209

Scope of section -It was held in some cases of the Madras High Court that this section applied only to a plaintiff bringing a suit as execu tor or legatee it did not debar a defendant from relying on a will for which no probate or letters of administration had been taken out as he was not seeking to establish any right as executor or legatee-Caralpaths v. Cota Nammalu ariah 33 Mad 91 (92) Ganta Daniselu v Gunti lesu 87 IC 354 AIR 1925 Mad 1110 Janai's v Dhanu Lal 14 Mad 454 (457) Sadagopa v Thirumalaswami 18 MLT 129 30 IC 272 (274) But this view was dissented from in Partha sarathi v Subbarasa 45 MLJ 175 AIR 1924 Mad 67 (70) 72 IC 559 which laid down that a person who in Court has to prove title and to deduce that title from a will cannot do so without producing probate whether he is plaintiff or defendant. In a later Full Bench case the Judges have considered these rulings and come to the conclusion (1) that there is nothing in this section which would in terms make it applicable to the case of plaintiff and not to the case of defendants (2) that a defendant can rely on an unprobated will provided that he does not do so in order to establish a right under the will and (3) that where the plaintiff sues as heir at law and the defendant produces a will and has to prove that some one other than the plaintiff has title under the will 10 where the defendant has got to prove title under the will (either in himself or in some other person) he cannot do so unless probate of the will has been taken in such a case he cannot use the unprobated will as a defence-Ganshamdoss v Gulab B: Ba: 50 Mad 927 (FB) 53 MLJ 709 AIR 1927 Mad 1054 (1059)

What is intended by this section is that an executor or legate cannot establish his right at executor or legate on a Court without obtaining probate but there is nothing to prevent the executor from dealing with the property of the deceased (e.g. collecting assets, selling any property to pay debts, etc.) without obtaining probate because under sec. 211 the executor is the legal representation of the executor of the property of the executor is the legal representation.

sentative of the deceased for all purposes and all the property vests in him as such so that the grant of probate is not a condition precedent to such acts. See Note 222 under sec. 211 and also Note 228 post

Executor or Legatee —This section applies to an executor or a legatee Where the plaintiff claimed right of management as a co-trustee under the will held that this section was inapplicable and the probate of the will was not a condition precedent because the claim was not for any right as executor or legatee —Durai v Duraisamy 33 M LT 214 105 IC 194 A I R 1927 Mad 948 (950)

The words executor or legatee include a person claiming under the executor or legatee—See Hoji Mahomed v Musaji 15 Bom 657 (669). Under this section the absence of a probate or of letters of administration not only affects the establishment of the right to legacy by the legatee lumself or some other person claiming under him but also debars a person who desires to establish the legatee's right merely as a just terth for the purpose of his defence—Lakshmamma v Ratnamma 38 Mad 474 (477) 25 ML 1 556 21 IC 698

Where on the application of the executor for a probate the fail of the ludge was obtained but there was no actual order for the issue of a probate and the probate was not issued owing to the failure of the executor to pay the requisite court fees for the same held that the fail of the Judge for grant of probate was only conditional and was not equivalent to an actual grant of the probate within the meaning of this section that in the absence of the probate the plaintiff was debarred from claiming any rights flowing from the will and that the mere production proof and exhibition of the will as an ordinary exhibit in the case were not equivalent to proof of the right by the production of the probate as required by this section—Alamclammal v Suryapakasaraja 38 Mad 988 (991) 29 M.L.J 680 31 IC 491

Where there are several legatees this section does not require that every legatee must obtain a probate or letters of administration in order to be entitled to maintain a claim for his legacy. When once the will has been proved by one legatee it is not necessary to prove it again. Thus a testator had bequeathed an allowance for maintenance to a legatee and she proved the will and obtained from the District Judge letters of administration with the will annexed in respect of the whole estate but this grant was modified by the High Court by limiting it to the realisation of the maintenance allowance provided for her by the will Before the District Judge could recall and alter the said letters in conformity with the judgment of the High Court the legatee died. Then another legatee to whom the testator had similarly bequeathed an allowance for maintenance brought a suit to recover her legacy Held that this legatee was not bound to obtain fresh letters of administration to entitle her to recover her legacy because the util had already been proved by the first mentioned legatee by obtaining letters of administration. This section had therefore been complied with and the fact that the letters were subsequently limited to the realisation of the maintenance allowance was immaterial-Chandra Kishore v Prosonna humari 10 CWN 864 (866) affirmed 38 Cal 327 (334) (PC)

227 Absence of Probate—Effect—In the absence of a probate the will cannot be used for establishing any right as executor or legates—Prayag Auman v Siia Prosad 42 CLJ 280 (407) AIR 1926 Cal I 93 IC 385 This section does not debar the use of a will of which no probate has been obtained as evidence for a purpose other than the establishment of a right as executor or legatee eg for the purpose of establishing the existence of relation of Moliant and chela referred to in the will—Achyudanada v Jegannath 20 CW.N 122 (125) 27 IC 739 or for showing the intention of the testator

225B Administrators —The word administrators in policies of intracance cannot be read so as to include those who are releved of the necessity of taking out letters of administration by reason of the provisions of sec. 212 (2)—Ashutosh v Protato Chandra 40 C W N 1247

Section 187 Act X of 1865 Sec 2 (1) Act VIII of 1903 Z13 (1) No Right as executor or legatee when established

(1) No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in British India has granted pro-

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Amendment —Sub section (2) has been amended by the Indian Succession Amendment Act XVII of 1929 This is merely consequential upon the amendment made in sec 57 of the same Act See Gazette of India 1929 Part V p 209

Scope of section -It was held in some cases of the Madras High Court that this section applied only to a plaintiff bringing a suit as execu tor or legatee it did not debar a defendant from relying on a will for which no probate or letters of administration had been taken out as he was not seeking to establish any right as executor or legatee-Caralpaths v. Cota Nammaluariah 33 Mad 91 (92) Ganta Daniyelu v Gunti Vesu 87 IC 354 AIR 1925 Mad 1110 Janaki v Dhanu Lal 14 Mad 454 (457) Sadagopa v Thirumalasuami 18 MLT 129 30 IC 272 (274) But this view was dissented from in Partha sarath: v Subbara; a 45 MLJ 175 AIR 1924 Mad 67 (70) 72 IC 559 which laid down that a person who in Court has to prove title and to deduce that title from a will cannot do so without producing probate whether he is plaintiff or defendant. In a later Full Bench case the Judges have considered these rulings and come to the conclusion (1) that there is nothing in this section which would in terms make it applicable to the case of plaintiff and not to the case of defendants (2) that a defendant can rely on an unprobated will provided that he does not do so in order to establish a right under the will and (3) that where the plaintiff sues as heir at law and the defendant produces a will and has to prove that some one other than the plaintiff has title under the will 10 where the defendant has got to prove title under the will (either in himself or in some other person) he cannot do so unless probate of the will has been taken in such a case he cannot use the unprobated will as a defence-Ganshandoss v Gulab B: Ba: 50 Mad 927 (FB) 53 MLJ 709 AIR 1927 Mad 1054 (1059)

What is intended by this section is that an executor or legatee cannot establish his right as executor or legatee in a Court without obtaining probate but there is nothing to prevent the executor from dealing with the property of the deceased (eg collecting assets selling any property to pay debts, etc.) without obtaining probate because under sec 211 the executor is the legal representations.

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Where on the application of the executor for a probate the fail of the Judge was obtained but there was no actual order for the issue of a probate and the probate was not issued owing to the failure of the executor to pay the requisite court fees for the same held that the fail of the Judge for grant of probate was only conditional and was not equivalent to an actual grant of the probate within the meaning of this section, that in the absence of the probate he plantiff was debarred from claiming any rights flowing from the will and that the mere production proof and exhibition of the will as an ordinary exhibit in the case were not equivalent to proof of the right by the production of the probate as required by this section—Alamelanmel v Surjapakasaraja 38 Mad 988 (991) 29 ML 1 680 31 IC 491

Where there are several legatees, this section do s not require that every legatee must obtain a probate or letters of administration in order to be entitled to maintain a claim for his legacy. When once the will has been proved by one legatee it is not necessary to prove it again. Thus a testator had bequeathed an allowance for maintenance to a legatee and she proved the will and obtained from the District Judge letters of administration with the will annexed in respect of the whole estate but this grant was modified by the High Court by limiting it to the realisation of the maintenance allowance provided for her by the will Before the District Judge could recall and alter the said letters in conformity with the judgment of the High Court the legatee died. Then another legatee to whom the testator had similarly bequeathed an allowance for maintenance brought a suit to recover her legacy Held that this legatee was not bound to obtain fresh letters of administration to entitle her to recover her legacy because the will had already been proved by the first mentioned legatee by obtaining letters of administration. This section had therefore been complied with and the fact that the letters vere subsequently limited to the realisation of the maintenance allowance was immaterial-Chandra Aishore v Prosanna Kumari 10 CWN 864 (866) affirmed 38 Cal 327 (334) (PC)

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227 Absence of Probate—Effect —In the absence of a probate the will cannot be used for establishing any right as executor or legate-prayag Kuman v Sia Prosad 42 CLJ 220 (407) AIR 1926 Cal 1 93 IC 385 This section does not debar the use of a will of which no probate has been obtained as evidence for a purpose other than the establishment of a right as executor or legatee eg for the purpose of establishing the existence of relation ship of Mohant and chela referred to in the will—Achyutanada v Jagannath 20 CWN 122 (125) 27 IC 739 or for showing the intention of the testator

with regard to his estate—Projag Auman v Sina Prosad (supra) But a will of which no p obate has been obtained cannot be used to prove that any person named therein has title to the estate of the testator this is expressly laid down in this section—Basunta humar v Gopal Chunder 18 CWN 1136 (1137) 26 IC 21

Though the executors can establish no right without taking out probate the existence of the will cannot be ignored for all purposes whatsoever. Thus a Hindu defendant in a pending suit died leaving a will but the executors did not apply for probate of the will. His step brothers took possession of his property and were brought on the record as the representatives of the deceased in the suit and a decree by consent was passed. The mother of the deceased almong to be entitled to the estate of her son as against the step-brothers then sued to set aside the decree on the ground that the will ought to be ignored as no probate had been obtained. Held that the will could not be ignored as no probate had been obtained. Held that the will could not be ignored and since the mother was not entitled under it she could not sue to set aside the decree—Janah v Dhanu Lal. 14 Mad. 454 (457). It is not right to treat a will of which probate has not been granted as non existent and the property passing by intestacy—Parthasarathy v Subbaraya. 45 ML J. 175. 72 I.C. 559. A.I.R. 1934. Mad. 657 (70).

Where a will has been left by a deceased Hindu but no probate has been taken out the person who takes possession of the estate of the decea ed pending assue of probate must be treated for some purpose as his representative. A judgment obtained against such a representative is not a mere nullity otherwise the remedy of the creditor against the estate might be barred by an intentional delay of the executor in taking out probate. But though the decree might not be executed against the estate in the hands of an executor when he has taken out probate it is at any rate sufficient to enable a suit being brought against the executor to have the decree satisfied-Prosonno v Kristo 4 Cal 342 (346) Dinamans v Elahadut 8 CWN 842 (851) It cannot be rightly said that because no probate of a will or letters of administration had been granted to any per on nobody represented the deceased at the time of a suit for recovery of a debt from the latter's estate. The true legal representative is bound by an order passed in execution proceedings obtained after notice against the heir at law and the residuary legatee under the will of a deceased judgment debtor-Chuns Lal v Osmand 30 Cal 1044 (1057) If the legal herr of the testator comes into posses ion of his general estate he can even though he has not taken probate or letters of administration maintain a suit for the benefit of the estate so long as any other claimant does not establish his right to the same under the will-Basunta Kumar v Gobal Chunder 18 CWN 1136 (1138) 26 IC 21

So also a transferce of an executor who had not taken probate but who was in possession can bring a suit to eject a trespasser. The tran ferce in such a ca has better title to possession thru the trespasser and the absence of the probate is no bar to his ejectment. Parthasarathy v Subbaraja 45 M.L.J. 175 A.I.R. 1824 Mad 67 (71). 72. I.C. 559

228 Executor can file sunt before obtaining probate —This section lays down that an executor or legatee cannot establish his claim before obtaining probate or letters of administration as the case may be but this section is no bar to his bringing a suit before obtaining probate (or letters of administration with will annexed) provided that it is obtained before the hear ing or at any rate before decree See Chandra Aishore v Prasanna Auman 38 Cal 327 (33.5) (PC) Harmany v Dhanbar 31 Bom LR 511 AIR 1929 Bory 289 (250) 120 IC 338 Jamestin v Haribbar 37 Bom 158 IS Bom LR

193 19 I C 400 Charu Chandra v Nashu Chandra 50 Cal 49 36 C L I 35 A.I.R. 1923 Cal 1 Duarka Nath v Ray Ram 8 OW.N 1198 AIR 1932 Oudh 85 (87) 134 I C. 172 Raichand \ Jivraj 33 Bom L R 1372 A I R 1932 Bom 13 (14) Gopal Lal v Amulya 59 Cal 911 A I R 1933 Cal 234 (236) In England also it has been held that although an executor cannot maintain actions before probate except upon his actual possession yet he may advance in them so far as that step where the production of the probate becomes necessary and it will be sufficient if he obtains the probate in time for that exigency-Wills v Rich 2 Atk 285 Easton v Carter 5 Exch 8 (11) See also Damell's Chancery Practice 7th Edn Vol I pp 351 352 Thus where he sues as executor he may commence the action before probate-Martin v Fuller Comb 871 Hankford v Wankford 1 Salk 302 (303) Webb v Adkins 14 CB 401 Humphreys v Ingledon 1 P Wms. 753 and the subsequent probate makes the action a good one if obtained at any time before hearing-Humphress v Humphreys 3 P Wms. 351 But the Court may make an order compelling him to produce the probate upon which he founds his right to maintain the action or stay proceedings until he places him in a position to do so-Webb v Adkins 14 CB 401 Tarn v Commercial Bank of Sydney 12 QBD 294 An executor may pending an application for probate bring an action to protect the estate by obtaining an injunction or otherwise although he alleges in the state ment of claim that he has not yet obtained probate. See Newton v Metropolitan Ry I Dr & Sim 583

But the practice of granting a decree in favour of the executor or legatee with a direction that the decree is not to be scaled until probate is granted or representation taken out is not correct—Rankland v Jivraj supra

Others acts of executor before probate — The executor before he provided in the provided of the executor before the sum and the acts which are incident to his office except only some of those which relate to suits. Thus he may seize and take into his hands any of the testators effects and he may enter peaceably into the house of the heir for that purpose and to take specialities and other securities for the debits due to the deceased. He may pay or take releases of debits owing from the estate, and he may recure or release debits which were owing to it and distrain for rent due to the testator. And if before probate the day occur for payment upon bond made by or to the testator payment must be made to or by the executor though the will be not proved upon like penalty as if it were. So he may sell give away or otherwise dispose at his discretion of the goods and chattles of the testator before probate he may assent to or pay legacies.

And although the executor should die after any of these acts done without proving the will jet do these acts so done stand firm and good —Williams on Executors (11th Edn.) Vol. I pp 213 214

229 Sub section (2) — As regards Hindus this section applies only to those wills which are governed by the Hindu Wills Act (now sec 57 of the present Act) Therefore an executor or legatee cannot establish his right in a Court under such a will unless probate or administration has been granted—Chum Lel v Osmend 30 Cal 1044 (1056) Gordkandas v Bai Ramceover 26 Bom 267, Lakshmamma v Rahnammia 38 Mad 474 (477) 21 1C 698

In the case of wills which are not governed by the Hindu Wills Act (e.g. a will executed in U P Punjab C P or in the mofussi of the Bombay or Madras Presidency) an executor may establish his right in a Court of Justice without taking out probate—Aonkaya Lal v Munni 18 All 260 Mata Din v Gaya Din 2 OC 33 Keth: v Kamal Lochan 2 N.L.R. 123 Bhagvansung v Becharadas 6 Bonn. 73 Shaik Mossa v Shaik Essa, 8 Bonn 241 Ganapathi v

Stvamalar 36 Mad 575 (577) and there is no necessity to take out probate or letters of administration for the purpose of enabling the legates under the will to claim the bequests given to them—Rapah Parthsarathy v Rapa Penkatadri 46 Mad 190 (223 224) 43 M.L.J 486 A.I.R 1922 Mad 457 70 IC 689 This section does not apply to wills made by Hindus in the Punjab and relating to immoveable property situated in the Punjab because such wills do not fall within the ambit of clauses (a) and (b) of sec 57—Sohan Singh v Bhag Singh 35 P.L.R 441 A.I.R 1924 Lab 599 (600).

This section does not apply to wills of Hindus made prior to the Hindu Wills Act 1870 [see clause (a) of see 57] and therefore it was not obligatory on executors or legatices under such wills to take out probate or letters of administration in order to establish their rights in a Court—Krishna Kinkar v Rai Mohan 14 Cal 37 Krishna Kinkar v Panchuram 17 Cal 272 (275)

If a Hindu embraces Christianity and is a Christian at the time of his death succession to his estate is governed by the Succession Act and any person basing his title under a will executed by such Christian cannot establish his claim without obtaining probate under this section—Duarka v Raj Rani 8 OWN 1198 A IR 1932 Outh 85 (87) 134 IC 173

230 Mushammadam Will —There is no provision of law rendering it obligatory in the case of a Mahomedan will to take probate. After due proof a Mahomedan will sa admissible in evidence notivithatanding that grant of probate has not been obtained—Sakina Bibbe v Mahomed Ishak 37 Cal 839 (844) 15 CWN 185 8 1 C 655 Syed Abdul Alm v Bedaruddin 28 CWN 285 AIR 1924 Cal 757 Shair Moosa v Shank Essa 8 Bom 241 The person to whom the execution of the last will of a deceased Mahomedan is by the testator s appointment confided may bit need not apply for the probate of the will — Wilson & Anglo Mahomedan Law (371 Edn) p 231

Section 4 Act VII of 1889

## 214 (1) No Court shall—

Proof of representative title a condition prece dent to recovery through the Courts of debts from debtor of deceased per sons

- (a) pass a decree against a debtor of a deceased person for payment of his debt to a person claiming on succession to be entitled to the effects of the deceased person or to any part thereof, or
- (b) proceed, upon an application of a person claiming to be so entitled, to execute against such a debtor a decree or order for the payment of his debt.

except on the production, by the person so claiming, of-

- (1) a probate or letters of administration evidencing the grant to him of administration to the estate of the deceased, or
- (11) a certificate granted under section 31 or section 32 of the Administration General's Act III of 1913, and having the debt mentioned therein, or

(iii) a succession certificate granted under Part X and having the debt specified therein or

(1v) a certificate granted under the Succession Certi-

ficate Act, 1889, or

- (v) a certificate granted under Bombay Regulation No VIII of 1827, and, if granted after the first day of May, 1889, having the debt spefied therein
- (2) The word "debt" in sub-section (1) includes any debt except rent, revenue or profits payable in respect of land used for agricultural purposes

Applicability of the Section —In order that sec 214 may apply it is necessary that in respect of the money claimed there should be a relationship of debtor and creditor between the person from whom the money is claimed and the deceased at the time of the latter's death. Consequently when the legates of a share in the residue dies before the administration of the estate is complete and subsequently the heir of such legates seeks to recover the same from the executor of the testator's will sec 214 does not apply and such heir is not required to take out a succession certificate before he can receive payment—Secty of State v Panyla Ebb 40 CWN 185

The words on succession have been newly added. In clause 214 (1) (a) and in heading to this Part we have added the words on succession as a majority of us are of opinion that the addition is necessary to make it clear that no change has been made in the existing law —Report of the Joint Committee.

231 "Pass a decree" —This section forbids any Court from passing a decree against a debtor of a deceased person for payment of his debt except on production by the person claiming of a probate or letters of administration or succession certificate. Even if the claim is compromised by the parties and they pray that a decree be passed in terms of the compromise the decree would be a decree against the debtor within the meaning of this section and under its peremptory provisions the plaintiff must produce a succession certificate before the can get a decree—Santan N Ratin 15 Bom 105 (106). A Court cannot pass a degree provisional or otherwise against a debtor of a deceased person for payment of the debt to any person who does not hold probate or letters of administration or succession certificate—Ma Sein N3a v Ma Mai Tee 2 L B R 164.

The executors of the will of a subject of a Native State cannot maintain a sunt in a British Court on the strength of a probate issued by a Native Court a copy of which is certified by the Political Agent but must take out probate or letters of administration or succession certificate in British India—Manasing v Ahmad Aumh 17 Mad 14 (16) See notes under sec 382

But the production of a succession certificate is not a condition precedent to the institution of a suit against the debtor it is sufficient if the certificate is produced at any time before the decree is made. There is no provision of law which requires that a succession certificate must be filed along with the plaint—Gulshan Ali v Zahir Ali 2A ili 549 (554 555) 18 A L J 666 Lachmi v Ganga 4 Ali 485 Janaki Ballav v Hafiz Mahomed 13 Cal 47 Shital Chandra v Mamik Chandra 13 C W N 509 (513) 9 C L J 331 Zhahur Minn v Puran Shift 5 P L T 504 A IR 1934 Pat. 525 In re Ramadas 10 Bom 107 Alice

Throp \( \) Sheikh Shametullah \( 3 \) PLR \( 160 \) 44 \( 1C \) 733 \( Fatimabai \) \( \) Pibha \( 21 \) Bom \( 580 \) Chima Moricaja \( \) \( A \) \( \) A \( \) M \( \) N \( 627 \) 91 \( C \) 210 \\
The Court should not dismiss a suit on the ground of want of succession certificate but must give an opportunity to the plaintiff of obtaining and producing the certificate Gulshon \( Ali \) \( Zali \) Ali \( 42 \) Ali \( 519 \) (555 \) 18 \( A \) \( L \) \( 1666 \) \( Iauad \) Ali \( \) \( Aamlejat \) 18 \( A L \) \( 151 \) 56 \( 1C \) 611 \( Girsham Life Insurance Society \) \( Collicto \) 54 \( Ali \) 1026 \( Ali \) 133 \( Ali \) 133 \( Ali \) 31 \( Ali \) 33 \( Ali \) 323 \( Ali \) 133 \( Ali \) 33 \( Ali \) 323 \( Ali \) 163 \( Ali \) 17 \( Ali \) 180 \( Ali \) 17 \( Ali \) 180 \( Ali \)

Where an application is presented to a Court for leave to sue in forma paupers it need not be accompanied by a succession certificate. The Court can entertain the application without such certificate—Lammathi v Mangapha 16 Mad 454 (455)

The Court may pass judgment in favour of the plantiff without the production of a succession certificate and may postpone the issue of a decree till the certificate is produced. Such a procedure is perfectly legal though it is neither destrable nor convenient—Rajanam v. Malan. 57 IC 650 (Nag.) But it is sillegal for a Court to pass a decree with a direction not to execute it without filing a certificate. The proper order is to allow a reasonable time to file a succession certificate before decree and on failure to dismiss the suit—Araiamudau v. Kaila Periumal 24 IC 143 (144) (Mad.) Janaki Ballau v. Hafiz Mahomed 13 Cal. 47 (49)

A party who fails to produce the necessary succession certificate in the Court of first instance should be permitted to do so by an Appellate Court on payment of costs for non production of the certificate in the Court of first instance-Muralidhar v Mohini 30 I C 510 (Cal.) If an objection as to the want of a succession certificate is taken for the first time in abbeal the suit should not be dismissed but opportunity should be given to the plaintiff to produce the certificate-Ammass Kutts v Appalu 29 IC 234 (235) (Mad ) Zahur Mian v Puran Singh 5 PLT 504 AIR 1924 Pat 525 An objection as to the want of a succession certificate should not even be allowed to be taken for the first time in appeal without giving the plaintiff an opportunity of producing a certificate-Umesh Chandra v Mothura Mohan 28 Cal 246 (249) If a succession certificate is not produced before the Court of first instance but no plea is raised as to want of certificate and the Court decrees the suit but an objection is taken for the first time in appeal the appellate Court can accept the certificate-Bhudat v Mangat 1934 ALI 579 147 IC 1168 AIR 1934 All 296 (297)

As no decree can be passed under this section against a debtor of a deceased person for payment of his debt to a person claiming to be entitled to the effects of the deceased person except on production of ome sufficient authority under this section a debtor is under no legal obligation to pay to the person claiming if the latter does not produce a certificate or probate or letters of administration or some authority to collect the debts due to the deceased And if the debtor chooses to pay th debt to an unauthorised person without insisting on the production of a succession certificate etc his payment does not discharge his debt to the estate of the deceased—Gold Nath v Craddock 72 PR 1903

This section enumerates five kinds of proof of representative title on production of any one of which the representative will be entitled to a decree See clauses (i) to  $(\nu)$  If the planntiff has obtained letters of administration as mentioned in clause (i) it is not necessary for him to obtain any succession certificate—Ramanugtah V Chum Lal 27 I C 822 (823) (Cal)

Debt -A present debt though payable in future and in the cir cumstances actually only payable after the death of the creditor is a debt within the meaning of this section. Therefore in the case of a debt existing in the life of the creditor which d d not become payable in the circumstances until after his death his heirs cannot obtain a decree without the production of a succe sion certificate-Banchharam v Adjanath 36 Cal 936 (FB) 13 CWN 956 (971) (overruling Nemdhart v Bissessart 2 CWN 591) Abdul Karım v Maqbulunnıssa 30 All 315 (318) A debt is a sum of money now payable or a sum of money which will become payable in future by reason of a present obligation-Webb v Stenion (1883) 11 QBD 518 Edmunds v Edmunds (1904) P 362 Sparks v Young (1858) Ir R 8 CL 251 There fore the dower of a Mahomedan wife whether prompt or deferred is a debt within the meaning of this ection and her heirs cannot obtain a decree for it without producing a succession certificate-Ghajur v. Kalandari 33 All 327 (FB), 9 IC 177 Abdul Karım v Maqbul un nıssa 30 All 315 (317 318) Sayed Ahmed v Bunyadı 88 PR 1891 Sharifunnissa v Masem Alı 42 All 347

Where after the death of a partner of a firm his son sued for an account of the capital and profits of the partnership and for payment of the share of his father without obtaining letters of administration or succession certificate h ld that the claim was not a debt as there was at the time of the death of the plaintiff sfather no present obligation to pay a liquidated sum of money to him. A succession certificate was therefore not necessary—Sabju v Noordun 22 Mad 139 (141). An action claiming an account is not an action for recovery of debt as the amount is not liquidated. Therefore a succession certificate is unnecessary for the maintenance of a suit by the plaintiff as heir of the deceased against the defendant who was the agent of the deceased for an account of the defendant selentings with the proporty of the deceased of an account of the defendant so claims of the deceased of an account of the deceased is not a suit for a debt as it is a claim for unliquidated damages and not a claim for a certifari sum of money. No certificate is necessary to enable their hirt to sue—Subbanna v Mineske 18 Mad 457 (458)

In the case of a residuary bequest the residue does not come into existence till all the debts specific legacies and costs payable out of the estate have been paid and the residuary legatee (or his heir) has no interest in any specific property of the testator till the residuary estate has been ascertained after those payaments have been made. Therefore if the residue had not been ascertained up to the time of the death of the residuary legatee there was no debt due to the legatee in his life time and consequently his heir applying to be paid his share in the residuary estate need not obtain a succession certificate—Secretary of State v Pariyat 40 CWN 185 on appeal from 60 Cal 1135 37 CWN 769 (774 788) AIR 1933 Cal 841

Rent not yet due is not an existing debt and cannot be described as debt accruing—Jones v Thompson (1858) 1 El B & E 63 So where the rent sued for became due after the death of the deceased proprietor it formed no part of his estate at the time of his death and therefore no certificate was

necessary to cutile the heir to recover the rent—Ranchordas v. Bhagubhai 18 Bom 394 (396)

Money due on an insurance policy was not an existing debt at any time before the death of the deceased and no succession certificate is necessary for the heirs to recover the money—Charusila v Jostis Chandra 33 IC 157 (Cal) Stimitasa v Ranganayaki 3 LW 466 32 IC 991 But see contra—Withol Rao v Hamimatha 50 Mad 412 52 MLJ 171 100 IC 484 AIR 1927 Mad 359; Gresham Insurance Society v Collector 54 All 1026 1932 ALJ 1015 AIR 1933 All 1 (2) 143 IC 343 See also Mathieu v Northern Assurance Co (1878) 9 Ch D 80 27 WR 51 in which it was held that the insurance company is a debtor and Vishtanath v Multay 13 Bom LR 590 II IC 954 (966) in which policy moneys were held to be debts

After the death of a person his widow took out a succession certificate Then after the death of the widow the reversioners applied for succession certificate in respect of (1) a sum in depost as compensation money awarded in a case under the Land Acquisition Act (2) a sum payable as arrears of rent for non agricultural lands from the tenant of certain premises comprised in the estate and (3) a Government pro note standing in the name of the widow as certificate holder of the estate of her husband Held that all these three items were debts due to the deceased for which succession certificate was necessary—Abmash Chandra v Probobil Chandra 15 CWN 1018 10 TC 357

A suit by the heir of a vendee for the refund of price paid for goods sold but not delivered is a suit for recovery of a debt and a succession certificate is necessary—*Penta Reday v Anti-Redat 2 MLJ* 34

233 Mortgage debt — A decree for the foreclosure of a mortgage is not one for the payment of a debt so as to fall within the provisions of this section. The direction to pay within the period fixed in the decree is given not to fix a personal liability for the debt but to enable the defendants to save their right of redemption and to prevent its extinction by foreclosure—Ammania v Gurumurth 16 Mad 64 Manuari v Muthrana 1900 A WN 89

But a suit for redemption (brought by the heir of the mortgagor) is not a suit against a debtor to obtain a decree for payment of his debt. On the other hand the plaintiff is really the debtor and not the creditor and the defendant mortgages is the creditor of the deceased mortgagor and not his debtor Obviously therefore a person who as neir of the mortgagor is bringing a suit for redemption is not sung to recover any debt and is not required to produce a succession certificate—Zafter Ali v Kanti Prakash 119 IC 96 AIR 1929 All 896

A suit to recover the money due under a usufructuary mortgage is not a suit for money due under a contract but is in reality one for as essment in money of the value of the plantiff's mortgage interest. The amount cannot be treated as a debt within the meaning of this section—Anumagam v Valura Faundam 24 Mad 22 Umesh Chandra v Mathura Moham 28 Cal 246 (248).

A suit to recover money due on a simple mortgage by sale of the mort gaged property is not a suit for recovery of a debt but is a suit to enforce a charge on immoveable property and no succession certificate is necessary to be obtained by the heirs of the mortgages to recover the money—Kanchan V Bain Nath 19 Cal 336 (339) Mahomed 1suit v Abdur Rahm 26 Cal 339 Baid Nath v Shamanund 22 Cal 143 Raghu Nath v Porish Nath 15 Cal 54 (577) Nanchand v 1 enatus 28 Bom 630 (632) Subremanian v Rakku 20 Mad 232 Palam v Veerammad 29 Mad 77 Pallam v Bapanna 22 Mad

380 This section limits the necessity of a succession certificate to those suits where the Court is called upon to pass a personal decree against a debtor of a deceased person for payment of his debt and does not apply to a suit for sale upon a mortgage-Nanchand v Yenaua supra The Allahabad High Court however is of opinion that money lent on the security of a mortgage is a debt due from the mortgagor to the mortgagee and a decree in a suit on such mort gage is a decree for payment of debt by sale of the mortgaged property con sequently a succession certificate is necessary-Fateh Chand v Muhammad Baksh 16 All 259 (FB) Allahdad v Sant Ram 35 All 74 10 AL J 566, Azmat V Sitla 9 ALJ 766 16 IC 108 Kasumari V Makkhu 49 All 1 AIR 1927 All 227 96 I C 478 Where the personal remedy under the mortgage deed had become barred by time long before the suit was brought and the mortgagee was simply entitled to a decree for sale of the mortgaged property it was held that the application for the execution of the mortgage decree for realisation of the amount by sale of the mortgaged property was not an application to obtain an order for the payment of his debt. No succession certificate was therefore necessary at all-Mohammad Ibrahim v Bhaguan Das AIR 1935 All 897 158 I C 885 Where the suit is one to enforce a mortgage security and not for a mere personal decree against the mortgagors the bar of sec 214 of the Indian Succession Act does not apply-Kulwanta Beua v Karam Chand 43 CWN 4

But an application by the heirs of a mortgagee for a personal decree under sec. 90 of the Transier of Property Act (O 34 r 6 C P Code 1908) requires a succession certificate. Thus where after a decree for sale had been made in a mortgage suit the mortgagee died and his sons got themselves substituted on the record but the proceeds of the sale of the mortgaged property proving insufficient they applied for a personal decree for the balance held that until the applicants obtained a certificate no such decree could be made in their favour—Sahadev v Sakhauai 12 CWN 145 (149) 7 CLJ 658 Abdul Sattar v Satjabhushan 35 Cal 767 Nanchand v 1 enaug 28 Bom 630

234 Portion of Debt —According to the Allahabad High Court the word debt signified the whole debt and not a portion of it a certificate could not be granted in respect of a portion of a debt because to do so would cause the splitting of an indivisible hability and would lead to the harassing of the debtor more than once on one cause of action and to multiplication of suits thereon—Ghajur Khan v Kalandari 33 All 327 (FB) 8 ALJ 79 Sughra Begum v Mohammad Mir Khan 43 All 341 19 ALJ 116 Bismilla v Tanassisi 32 All 1335 7 ALJ 255 Muhammad Ali v Puttan Bib 19 All 129 Sitab Debi v Debi Prasad 16 All 21 Kanhanja Lal v Chandar 7 All 313 Thi was also the view of the Punjab Chief Court—Kishore Chand v Nihal Devi 70 PR 1904 (following 16 All 21)

The Calcutta High Court dissented from this view and held that there was nothing in this Act to prevent a certificate being granted in respect of a portion only of a particular debt due to a deceased person—Mohamed Abdul Hossam v Sharifan 16 CWN 231 15 CLJ 384 Annapurna v Nalim Mohan 42 Cal 10 18 CWN 836 The Madras High Court took the same view—Sreeniusas v Sundararaja 17 MLJ 37

The whole controversy has now been set at rest by the amendment of sec 372 sub section (3) which expressly lays down that application for a succession certificate may be made in respect of any debt or debts due to the deceased creditor or in respect of portions thereof

There is a serious conflict between the different High Courts as to whether certificate can be applied for or granted in respect of a portion of a debt. The

Allahabad High Court holds that this cannot be done (Ghafur Khan v. halan dan Begum 33 All 327) while the Calcutta High Court holds a more equitable view (Annapurna v Nalini Mol an 42 Cal 10) An important question of far reaching effect is involved and it is necessary that it may be set at rest. Justice Karamat Husain has in Ghafur Khan's case referred to the difficulty likely to be caused by the Allahabad High Court view on pp 333-34. It is well known that dowers are very often fixed at enormous amounts which can never be recovered. Suppose the dower fixed as 11 lacs as in the case of Mulammad Ali v Puttan Bibi (19 All 129) The woman dies leaving her husband father and mother as heirs. The husband himself is entitled to half Her assets may be worth only one lac or someling less. Is it a fact that the hashand should prevent the father and the mother from realising what they can by urging that they should first pay succession certificate duty on 11 lacs? Similar difficulties may arise in cale of other debts where part only may be recoverable owing to the scanty assets of the debtors. The Calcutta view seems more reasonable and this Bill is meant to give effect to that view -Statement of Objects and Reasons (Gazette of India 1927 Vol V p 24)

Where a certificate has been granted in respect of the entire dcb to a person who is entitled to a 3½ share of the dcbt and subsequently another person who is entitled to a half share applies for a certificate in respect of her half share the Court is entitled to revoke the certificate already granted and grant a certificate to the applicant for the realisation of her half share—Sharifunnissa v Masum Ali 42 Ali 347 (352 353)

Where the deceased owned only a fractional share in a debt which was due to himself and other persons jointly a succe sion certificate cannot be refused to his heir or heirs merely because it can cover only a portion of the debt—Aishore Chand v Nihal Dess 70 P R 1904

If there are two joint creditors and one of them is dead the other creditor is entitled to maintain an action for his share of the debt impleading the legal representative of the deceased oc creditor as defendant. But if the legal representative desires to be joined as co plaintiff he must produce a succession certificate and on production of the same a decree for the entire amount should be pass ed—Skited Chandra v. Manuk Chandra 13 C WN 1509 (512) 1 IC 254

235 Debtor —This section does not apply where the plaintiff is not sung a debtor of the estate of the deceased but a person who has wrongfully collected the debts due to that estate after the death of the deceased The money in the hands of the defendant is due to the heirs of the deceased but the defendant in no sense can be said to have been a debtor to the estate of the deceased. He became a debtor only after the death of the deceased—Sahib Ram v Govinds 43 All 440 (443) 19 ALJ 268 60 IC 774 Thus where the defendants after selling their right to a deshimable has to the deceased wrongfully received payment of the has from the revenue authorities after the death of the deceased held that no succession certificate was necessary for the heirs of the deceased to the deceased to recover the same from the defendants because they never were debtors to the estate of the deceased but became debtors after his death—Naravan v 74tat 15 Bom 580

In the Allahabad case a sut by one of the hear of the wife against one of the hears of the husband to recover the proportionate part of the dower due to the wife has been held to be outside the scope of this section so as not to necessitate any succession certificate the reason being that the suit is brought not against the debtor of the decreaced but against one of the heirs of the

debtor—Shads Jan v Waris 43 All 493 (495) 19 A.L.J. 423 A.I.R. 1921 All 173 64 I.C. 1 This decision it is submitted is not correct. As the suit is brought by one of the heirs of the creditors a succession certificate is pre eminently necessary and the words debtor of the deceased in this section undoubtedly includes the heirs of the debtor of the deceased.

A said brought by the heir of the mortgagor against the mortgagee for redemption is not a suit against a debtor because it is the plaintiff who is really the debtor and the defendant mortgagee is the creditor. The plaintiff is seeking to pay 115 own debt and not to recover any debt. Consequently no succession certificate is necessary—Zoler Als v. Kants Prakash. A.I.R. 1929. All. 896–119. IC 96.

236 'Person claiming to be entitled," etc.—This section applies now to the person who himself institutes a suit for the recovery of a debt due to the deceased but also to a person who continues the suit instituted by the deceased for the recovery of a debt who has died pending the suit. And therefore no decree can be passed in flowour of the substituted plaintiff unless he produces a succession certificate—Vasqez v Pragn 16 Bom 519 Nepusi v Nasiruddin 27 CL J 400 45 10 730 Sahadev v Sakhauat 12 CWN 145 (148) 7 CL J 658 Abdul Sattar v Satyabhushan 35 Cal 767

An assignce from the heir of a deceased creditor is required to produce a succession certificate in order to recover the debts due to the deceased in the same way as the heir of the deceased creditor is bound to produce a certificate before he can sae to recover the debt, otherwise the assignce would be placed in a better position than the assignor—Karupposami v Pichu 15 Mad 419 Variavan v Srcenivasachaniar 44 Mad 499 (FB) 40 MLJ 481 Gulshan Ali v Zahr Ali 42 All 549 (553) 18 ALJ 566 Lalchand v Nandial 37 PR 1893 Where no certificate has been obtained by the assignor an assignce can be granted a certificate—Radha v Secretary of State 38 All 488 14 ALJ 550 Ram Chantar v Ram Norom 2 PL 13 30 40 IC 59 An anchoring prichaser of a debt which is part of the assets of the deceased is entitled to a certificate under this section—Manchanan v San Machals 18 Bom 315

But an assignee from a certificate holder can sue without a fresh certificate. The holder of a succession certificate possesses the right of transfer in respect of the debt and this Act does not take away from the holder this right of transfer. And it is not necessary that such transfer should be followed by a revocation of the certificate already granted and the grant of a fresh certificate in favour of the transferee. Where the ownership of a debt with respect to which a succession certificate has been obtained is nightfully transferred and the certificate is handed over to the transferee there is no bar to his suing for the debt—Rang Lal v Annu Lal 36 All 21 II AL J 968 (dissenting from Allahdad v Santram 35 All 74) Arunachada v Mulhu 42 Mad. 130 33 ML J 666 49 IC 735 Similarly an assignee of a decree from a person who has obtained letters of administration to the estate of the deceased decree holder is sentitled to execute the decree without obtaining fresh letters of administration—Ramavlali v Haridas 38 All 474 I AL J 67 34 IC 364

Where there is no evidence that a person was a partner with his father in the business carried on by the father in the name of a firm he is not entitled after his father s death to execute a decree obtained by the father in the name of the firm unless he can obtain a succession certificate—Bhagi on v Hirori 34 Bom LR 1112 140 IC 519 AIR 1932 Bom 516 (518)

A curator appointed under Act XIX of 1841 (now sec 195 of the present Act) is not a person claiming to be entitled to the effects of the deceased within

the meaning of this section he is not a representative of the deceased person but is merely entrusted by the Court with certain powers over the estate for a temporary purpose amongst which is the power to sue in his own name and he is not required to take out a certificate before he can obtain a decree—Babasab v Narsappa 20 Bom 437

Similarly a Receiver is not a person entitled to the effects of the deceased person. He is not the representative or agent of either party but his appoint ment is for the benefit of all parties and he holds the property for the benefit of those ultimately found to be the rightful owners. Therefore he is competent to take possess on of the securities and momes in deposit in a Bank without a succession certificate—Harihar v Harendranath 37 Cal 754 (758) 12 CL J 252

Where the trustee of-am endowment sued to recover a sum of money lent by his predece.sor held that he was entitled to do so without producing a success sion certificate because he was not sung as a person entitled to the effects of the deceased trustee but as manager—Mallikanjuma v Studeuamina 20 Mad 162 (PC) Similarly the successor and representative of a deceased Mahant need not take out probate or letters of administration or succession certificate to enable him to apply for execution of a decree made in favour of the deceased Mahant for costs incurred in proceedings carried on by him on behalf of the math— Josephan & Rom Chindate, 20 Cal 103

In cases in which a probate need not be obtained for a will and has not been obtained the executor appointed by the will is not exempted from the requirement of this section but must produce a succession certificate before he can obtain a decree for the debt due to the testators estate—Ramutts v Padmanabha 35 LW 264 AIR 1932 Mad 301 138 IC 494

Succession certificate as to impartible estate —Succession to an impartible estate is dependent and is to be determined upon the footing of survivor ship and no succession certificate need be produced when a decree for costs obtained by a previous holder of an impartible estate is sought to be executed by the succeeding holder the decree for cot is forming part of the impartible estate—Bigsa Prasad v Kesho Prasad ATR 1938 Pat 401. Succession to impartible rai governed by the rule of primogenture is decided by the rule of survivorship and a successor to an impartible estate takes it on the death of the previous holder by survivorship and not by succession The succeeding holder can therefore execute a decree for costs obtained by the decreased holder in a suit for possession without producing a succession certificate. The decree for costs is only a part of the estate—Bigsa Prasad v Paramatmannad ATR 1938 Pat 390.

Section 214 prohibts a Court from passing a decree before a succession certificate is produced but there is nothing to stop the plantiffs from prosecuting the suit and producing a succession certificate when called upon to do so in the course of the suit. The Court therefore should give opportunity to the plaintiff to produce a succession certificate—Baldev v People's Bank of Northern India Ltd. At IR 1938 Pesh 1

Where a decree holder dues during the pendency of his execution application and his heir or legal representative applies for substitution of his name for that of the deceased decree holder the Court cannot on that application proceed with the excution unless a succession certificate is produced for such an application falls within the words of sec 21. (1) (b) of the Succession Act—Tetral v Ramppari 1938 N L J 99 A IR 1938 Nag 528

Succession certificate, if can be granted in respect of money due on Life Insurance Policy -A succession certificate can be granted in respect of money due on life insurance policy under which the money is payable to the assured on a certain date in his life time or on death should it take place earlier In the case of Tulss Debya v Bibhuts Bhusan Gosuams (41 CWN 985) Ghose J observed For the opposite party in this Court a new point is taken namely that an application for succession certificate does not he because the amount due on the policy is not an ascertained debt. In support of this we have been referred to the case of Charustla Dass v Josish Chandra Sirkar (33 I C 157) That case however may be distinguished on the fact that the present also is an endowment policy and is payable in the life time of the deceased. In the aforesaid case it was remarked that it does not appear that the insurance money excepting in so far it became an ascertained debt before the death of the deceased is included in the Succession Certificate Act. The decision in this case was based on certain remarks made by Mr Justice Mookerjee in the Full Bench case (Bancharam Majumdar v Adyanath Bhattacharjee 36 Cai 936 13 CWN 966) the remarks being in the nature of obiter. That case also does not help the opposite party. In that case Jenkins CJ remarked. I take it to be well estab lished that debt is a sam of money which is now payable or will become payable in future by reason of a present obligation. It seems to us that there is no reason why this description should not be made applicable to a sum of money which is payable on this policy

Meaning of "succession" —The word succession is evidently inserted to except the case where the claim to be entitled to the effects of a deceased is based on survivorship it can have nothing to do with the question whether the person claiming and holding one of the catalogue of documents set forth in sec 214 is an heir of the deceased or not. The status and qualifications of the persons on entitled are not to be found in an interpretation of the word succession, but in the other provisions of the Succession Act itself or the other Acts referred to in sec 214 under which the grants are made—Kissenial v. Tilak Chandra 43 C.W.N. 1218.

Purpose of the Section —The purpose of sec 214 is merely to make clear that no dobt to a deceased person can be recovered through Court except by a holder of one of the documents specified the only exceptions being either where the claim is made on survivorship or where it relates to rent revenue or profits payable in respect of land used for agricultural purposes—Kissendal v Tuke Chandra 43 CWN 1218

237 "On Succession"—The Succession Certificate Act only refers to cases of succession Where the family is a joint Mitabistra family and the debt due to the family is consequently a joint family debt the plaintiff who claims by survivorship cannot be compelled to take out a succession certificate to enable him to recove the debt—Pallam Raju v Bapanna 22 Mad 330 Subramanian v Rokku 20 Mad 232 Beejraj v Bhyropersaud 23 Cal 912 (913) Bissen Chand v Chatrapat 1 CVW 1 32 Ram Chandrav 18 Bpt 16 Bom 240 Raghatendra v Bhima 16 Bom 349 Jagmohandas v Allu Maria 19 Bom 338 (339) Faltessiur v Bhaguat 17 All 578 Cur Pershad v Dharia 38 Cal 182 (185) Mathira v Durgauett 36 All 380 12 Al J 525 Maja Ram v Shib Das 20 PR 1901 Sakadev v Sakhateat 12 CWN 145 7 Cl J 658 (684) Pitchin Kutta v Ranganadhan 28 ML J 332 28 IC 490 Varadarajulu v Velayuda 22 LW 230 Al R 1925 Mad 1160 90 IC 743 Shectul Chandra v Lakshimmanne 63 Cal 15 Thus in a Mitakshara family the adopted

son takes the ancestral property of his adoptive father not as his heir but by survivorship and therefore he is not bound to obtain a succession certificate before he can obtain a decree to recover a debt due to his adoptive father. And the fact that he was adopted subsequent to the death of the adoptive father by his widow does not make any difference—Ramandan v Subramanyan 28 MLJ 372 28 IC 688. So also the illegitimate son of a Sudra governed by the Mitakshara law takes his father is property by survivorship and consequently no certificate is necessary to enable him to recover his debts—Ganulal v Kashram AIR 1923 Nag 67 68 IC 417. Where there was a grant of maintenance to two ladies with right of survivorship held that on the death of either of them the other would be entitled to the whole sum not by inheritance but by survivor ship and no succession certificate was necessary to be taken out by the survivor in order to entitle her to a decree—Mathura Prosad v Rukmini 13 IC 148 (150) 17 CLJ 87

But the converse proposition is not true that is if the persons claiming by survivorship chose to call themselves legal representatives and ask for a succession certificate their application should not be dismissed. The defendants may very well say that they represent the deceased person s estate and on that right they should be allowed to collect the debts with the help of a succession certificate —Banwari v Maksudan 52 All 252 1930 ALJ 280 AIR 1930 All 99 (100) 122 IC 183 Greshm Life Insurance Society v Collector 54 All 1026 AIR 1933 All 1 (3)

A person succeeding to an impartible estate takes by survivorship although his other rights under the law were in abeyance during the life time of the last incumbent on account of the pecuhar nature and incidents of the property. He is not therefore bound to produce a succession certificate before he can enforce the payment of debts due to his predecessor—Guru Pershad v. Dahmi. 38 Cal. 182 (187) 15 C.W.N. 49 Raja Shita Prasad v. Beni Madhab. 1 Pat. 387 (392) Al.R. 1922 Pat. 529. But the Madras High Court takes the view that the rule of succession to impartible estates is based on a theoretical coparenary that the successor to an impartible estate was not a co-owner with his predecessor in the money due to the latter before his death and that as he derives his title to such debts only at the death of his predecessor as part of such predecessors effects he cannot recover them without obtaining a succession certificate.—Raja of Kalahasti v. Khūgadu. 30 Mad. 454 (457 458)

As regards sell acquired properties the law is that an undivided Hindu son acquires such properties of the deceased father by inheritance and not by sur vivorship. Therefore in a suit by the son for the recovery of money which was the self acquired property of the deceased father a succession certificate must be produced before a decree can be given in his favour—Variatan v Srinivasachariar 44 Mad 499 (FB) 40 Mt J. 481 following Venkataramanna v Venkaya 14 Mad 37 Reghatendra v Bhima 16 Bom 349

In the case of a partnership if one of the partners dies the right to sue in respect of the debts due to the firm survives to the surviving partner. The representative of the dead partner need not be added as a plantiff and even if he is so added he need not produce any succession certificate—Pulin Behari v Abdul Mapid 4 It C 911 (Call) Balkissen v Annhaya Lel 17 CL J 648 21 IC 509. When a debt is owing to a joint Hindu family carrying on a bus ness as a partnership after the death of one of the partners the surviving partner may sue alone for the recovery of the debt without obtaining a succession certificate—Vaidyanatha v Chimiasaum 17 Mad 108. See also Mulk Raj v Amight 10 PR 1906 Gobind Prasad v Chandar Sekhar, 9 MI 486 Devi Das v

Nitpat 20 All 365, Motifal v Ghellabhar 17 Bom 6 (14) where it has been held that the legal representatives of the deceased partner need not be made parties. But in Kishori Chand v Nithal Deis 70 PR 1904 and Ram Naram v Ram Chandra 18 Cal 86 it has been held that the legal representatives of the deceased partner must be made parties. In Vandyanatha v Chimiasiana 17 Mad 108 it has been remarked that if the legal representative of the deceased partner is joined as a co-plaintiff a certificate of heirship will be necessary unless it appears on the face of the document that the debt was a co-parenary debt.

The vords on succession are inapplicable to a case where the property vests in the Croun by reason of failure of heirs. In such a case it cannot be said that the Crown is claiming the property by right of succession. The Indian Succession Act is not applicable to the Crown when it takes the property upon escheat—Secretary of State v Frim Gridhari Lol 54 All 226 1932 AL J 150 Al IR 1932 All 220 (221) 136 IC 565

238 Sub section (2) —Rent for agricultural land is not a debt within the meaning of this section and therefore no succession certificate is necessary—Nagendra v Satoladi 26 Cal 536 The amount of a decree for rent deposited by the tenant judgment debtor is to be considered as rent even after the death of the decree holder and his heir is entitled to withdraw the money from Court without the production of a succession certificate—Surendra v Upendra 18 IC 495 (Cal) Paddy rent is not debt and no succession certificate is necessary—Me His v Maung Nyun 2 Bur L J 45 75 IC 237 A IR 1924 Rang 139

But rent in respect of homestead land is not rent for land used for agricultural purposes it is a debt within the meaning of this section and succession certificate is necessary—Sheak Sakebjan y Sheith Abdul 41 IC 84 (Cal)

239 Clause (b) —This clause provides that the Court shall not proceed to execution except upon the production of a succession certificate. But it is not necessary that such certificate must be produced along with the application for execution. It is sufficient if it is produced and tendered in Court at any time before the Court proceeds to pass an order for the execution of the decree—halian Singh v Ram Charan. 18 All. 34. Hotilal v Hardeo 5 All. 212. Mangal Khan v Salimullah. 10 All. 26. Brojo v Isuar Chandra. 19 Cal. 482 (485) Janaki Ballau v Hofis Mahomed. 13 Cal. 47 (49) Shupa Ali v Ram Kpar. 20 All. 118. Beharis Lal v Mayla Ali. 24 All. 138. Sobha Singh v Fatta. 54 PR. 1893. Aundan Lol v Makhin. 27 PR. 1894. Balkishen v Wagar Sing. 20 Bom. 76. Monorath v Ambible 31.2 CWN. 533. 9Ct. LJ. 443. (449).

When a decree-holder dies pending the execution proceedings his heirs can continue the proceedings and can be substituted on the record without a succession certificate. This clause is not applicable where the heirs of the deceased are brought on the record after the execution proceedings had been commenced by the application of the deceased decree holder—Mahomed Yusul v Abdur Rahm 26 Cal 839 (841 842)

A person who claims to execute the decree obtained by the deceased no as the herr of the deceased but under an assignment or conveyance from the deceased decree holder need not produce a succession certificate. This Act does not apply to such a case—1 azirul Hassan v Abdul Walkab 7 PLT 27 AIR 1925 Pat 591 89 IC 811. This clause applies only to decrees or orders for the payment of debts but not to payment of duvidend to a scheduled creditor out of the assets of the modeent. It is not necessary for the heir of the

creditor to obtain a succession certificate in respect of his claim. The adjudication of the official receiver is sufficient—Omayash v Ramchandra 49 Mad 902, 51 M.L.J 349 97 IC 411 ATR 1926 Mad 899

Section 152 Act V of 1881 Section 21 Act VII of 1889 Effect on certificate of subsequent probate or letters of administration in respect of an estate shall be deemed to supersede any certificate previously granted under Part X or mider the Succession Certificate. Act, 1889, or Bombay Regulation No VIII of 1827, in respect of any debts or securities included in the estate

(2) When at the time of the grant of the probate or letters any suit or other pioceeding instituted by the holder of any such certificate regarding any such debt or security is pending, the person to whom the grant is made shall, on applying to the Court in which the suit or proceeding is pending, be entitled to take the place of the holder of the certificate in the suit or proceeding

Provided that, when any certificate is superseded under this section, all payments made to the holder of such certificate in ignorance of such supersession shall be held good against claims under the probate or letters of administration

This clause is intended to reproduce the effect of sec 152 of the Probate and Administration Act and section 21 of the Succession Certificate Act and appears to come in appropriately under this Part since it deals with the substitution of the title of the grantee for that of the certificate holder —Notes on Clauses

Section 260 Act % of 1865 Section 82 Act V of 1881 Grante of probate or administration, no other than the drumstration alone to sue etc until same person to whom the same may have been granted shall have power to sue

as representative of the deceased, throughout the province in which the same may have been granted, until such probate or letters of administration has or have been recalled or revoked.

240 So long as an appointment of a person as executor or administrator lasts no one else can represent the estate—Air Ibrahim v Zialnissa 12 Bom 150 Sakhi v Ram hisser 55 IC 504 (All )

Under this section it is only the executors who have obtained probate that can act as the representatives of the testator those who renounce or refuse or are unable to act should be regarded as if they had never been appointed—Satia Pressal v Motifal 27 Cal 683 (688)

Letters of administration to the estate of a deceased person were granted to his widow. The present plaintiff in a previous suit had obtained a declaration

that he was entitled as a legatee to a 4 anna share of the property left by the deceased. He now sued to recover a 4 anna share of the rent from a tenant of the deceased. Held that the suit was maintamable—Rajam Kant v. Makhan Lal. 15 I C. 542 (Cal.) Here the plaintiff was suing in his own right as legatee and not as the representative of the deceased. So a legatee who is under the will of the deceased entitled to all the moveables and debts can uith the permission of the executed round in favour of the deceased. Although strictly speaking the suit should have been brought by the executor himself still it will be taken as if the executor had assented to the legatee staling the pro note in that way (see see 332). But the legatee will be required to take out the usual succession certificate—Panna Deux v. Shan Lal. A IR 1933 Lah. 805 (806) 146 I C. 633

Where one of the executors has obtained probate this section does not bar another executor who has not obtained probate from acting as executor because it is settled law that it is not incumbent on a Hindu executor to obtain probate before acting—Chidambara v Krishnasami 39 Mad 365 (373) (per Seshaguri Alyar I).

The executor is bound to administer the estate until the administration is complete he is therefore entitled to bring a suit for recovery of the debts due to the estate of the testator even after the death of the sole legatee because so long as any debt is due to the estate of the testator the administration of the estate is not complete—Raloo v Bibs Ramoz 2 PLT 305 60 IC 350 (351)

Administrator becomes functus officio when administration is complete —As a result of the grant of administration the administrator as the legal representative of the deceased is the only person competent to deal with the estate. But it is to be seen for how long this power of the administrator would continue to the exclusion of the right of the beneficiaries. Section 216 does not lend any countenance to the proposition once an administrator always an administrator. The moment administration is completed the purpose of the grant will have been fulfilled and the administrator would virtually become function office—bullianta or Koram Chand. 43 CWN. 4

## PART IX

## PROBATI, I I TTI RS OF ADMINISTRATION AND ADMINISTRA TION OF ASSLTS OF DECLASED

The provisions of the Indian law regarding the grant of probate and administration of the assets of a deceased person are to be found in the Indian Succession Act 1865 and the Probate and Administration Act 1881 Those sections of the Succession Act which deal with representative title have already been disposed of by the preceding Part of the Bill and with those exceptions the provisions of the two Acts on the subject are with comparatively small differences identical This Part of the Bill therefore provides in general terms for the administration of the assets of deceased persons of all classes covered by the two Acts in question and provides in its separate clause such special exceptions which are necessitated in order that the existing law may be reproduced -Notes on Clauses

Section 2 Act X of Sections 2 and 150 Act V of 1881

217 Save as otherwise provided by this Act or by any other law for the time being in Application of Part force, all grants of probate and letters of administration with the will annexed and the administration of the assets of the deceased in cases of intestate succession shall be made or carried out as the case may be, in accordance with the provisions of this Part

The word intestate has been added. We have amended this clause to make it clear that it refers to intestate as well as to testamentary succession -Report of the Joint Committee

### CHAPTER I

# OF GRANT OF PROBATE AND LETTERS OF ADMINISTRATION

We have re arranged the provisions in the following order (1) administration in case of intestacy (2) probate (3) letters of administration -Report of the Ioint Committee

Section 23 Act V of 1881

To whom administra tion may be granted where deceased is a Hindu Muhammadan Buddhist Sikh Jama or exempted person

(1) If the deceased has died intestate and was a Hindu Mahammadan Buddhist. Silh or laina or an exempted person, administration of his estate may be granted to any person who, according to the rules for the distribution of the

estate applicable in the case of such deceased, would be entitled to the whole or any part of such deceased's estate

- (2) When several such persons apply for such admimistration, it shall be in the discretion of the Court to grant it to any or more of them
- (3) When no such person applies, it may be granted to a creditor of the deceased
- 241 Has died intestate Letters of administration can be granted under this section only when there has been an intestacy. A gift for maintenance is not necessarily a gift of a hie estate but is a gift of an absolute and heritable estate consequently at the death of the donce it cannot be said that there is an intestacy as regards the estate of the original devisor.— Mahima Chandra v Sarajubala 9 CL J 576 1 IC 140

To whom administration should be granted — The right to a grant of administration follows the right of succession and an heir entitled to a share on the distribution of the deceased intestate's estate is entitled to a grant of letters — Raya Rama v Fakruddin 53 Mad 480 122 IC 504 AIR. 1930 Mad 218 (220)

On the death of a barags or an ascetic his preceptor's preceptor is entitled to letters of administration to the estate of the deceased if he proves that according to the cistom prevailing in the sect of which he and the deceaed disciple were members he as the preceptor of the dead man's preceptor is entitled to his property—Collector V Jagat Chainder 28 Cal 608. The property acquired by a Mohant belongs to the religious shine of which he is the Mohant so letters of administration to such property can only be granted to the person who is shown to have near spiritual relationship with the deceased Mohant—Khazam v Ram Saron 46 PWR 1910 6 1C 650.

It was held in a Madras case that where the joint family property passed by survivorship to the sole surviving co-parcener (son) he was entitled to apply for letters of administration under this section. He was a person, who would be entitled to the whole or part of the estate of the deceased he would take his father's property if his father had died intestate-In re Dasu Manavala 33 Mad 93 (97) 19 M L J 591 But there is also the contrary view that if the deceased person and the present petitioner were members of a joint family then imme diately on the death of the deceased his interest in the estate at once ceases, and the whole interest in the estate belongs to the petitioner by survivorship and there is no estate of the deceased to be administered, there is no succession to the deceased a estate because he has left nothing to succeed to Consequently an application for letters of administration is not competent-Gobalasicams v Meenakshi 7 Rang 39 AIR. 1929 Rang 99 (102) 115 IC 905 Ramagiri v Goundamma 3 Bur.L.J. 116 AIR. 1924 Rang 329 (330) Uttam Devi v Dina Nath 56 PR. 1919 51 I C 651 (652) distinguishing 33 Mad 93 on the ground that the remarks therein were obiter and the case was one relating to court fees only

Where a woman became a prostitute and died leaving property acquired by prostitution letters of administration were refused to the nephews of the husband of the prostitute on the ground that prostitution severed the ties of kindred between her and her natural family or husband's family—Bhittnath v Secretary of State 10 C.W. N 1085 But this would not be good law now in view of the Full Bench decision in Hindel v Tripara Charan 40 Cal 650 where it has been authorita tively laid down that prostitution does not sever the ties of kindred See also Sandan v Nemye Charan 6 C.L.J. 372.

In order to entitle a person to letters of administration under this section he must be shown to have an interest in the estate. It is not sufficient that he may possibly have an interest—VIa Thi v Shine Hla 1 L BR 284 (285) A Hindle widow who has an interest in the estate of her husband is entitled to a grant of letters of administration in preference to a reversioner who has only a contingent interest which may never vest—Labshim v Nitsananda 64 IC 61 (Cal)

If a European lady renounces Christianity becomes a Hindu marries a Hindu according to Vedic rites and then dies leaving a will by which she be queaths her whole property to her husband and makes him the executor the husband is entitled to a grant of letters of administration even though the will is invalid being unattested—Ratiansi v Administrator General 52 Mad 160 55 MLJ 478 ÅIR 1928 Mad 1279 (1284)

Creditor —If none of the next of kin will take out administration a creditor may by custom do it on the single ground that he cannot be paid his debt until representation to the deceased is made and therefore administration is only granted to him failing every other representative—Williams on Executors 11th Edn p 352 Webb v Needham 1 Add 494 Letters of administration may be granted to the executors of a creditor—Jones v Beylagh 3 Phillim 635 The Court sometimes grants administration to more creditors than one but it prefers that one should be fixed upon—Harrison v All persons in general 2 Phillim 249

242 Procedure—Question of title, etc ....Although it is not neces sary for the Probate Court to decide what assets are likely to come to the hands of the petitioner for letters of administration still it is the duty of the Court in granting letters of administration to consider whether there is any estate whatever to be administered. No application for letters of administration can be entertained to an estate which has already been fully administered-Lalit Chandra v Baskuntha 14 CWN 463 (464) 5 IC 395 But this rule applies where the application is for letters of administration simply and not where the application is for letters of administration with the will annexed This distinction is important and should not be overlooked. When the application is for letters of administration with the will annexed it is of para mount necessity that the will should be established and the establishment of the will is one of the functions of the probate Court and the probate Court cannot refuse to exercise that function because the estate has been completely administered-Kamla Prasad v Murli 7 PLT 631 94 IC 750 AIR 1926 Pat 356 (357)

A grant of admunistration does not decide any question of title. It merely decides the right to admunister—Annala Prasad v Mult 7 P.L.T. 631 94 IC 750 A IR 1926 Pat 356 (358). It is not the practice of the Court to go into the question of title. It is sufficient under this Act if the person making an application for grant of letters of admunistration is according to the rules for the distribution of the estate of the deceased entitled to the whole or part of the property and alleges that there is property of that nature—Nish Kant v. Ashu tosh 17 C W N 613 23 I C 296 Debendra v Surendra 5 P.L.J. 107 54 IC 807. Thus a Hindu vidow governed by the Mitakshara law is entitled to obtain letters of administration to her husband's estate on the mere allegation that he left separate property and the Court cannot go into the question whether the property left was joint with the brother of the deceased and passed by survivor sinp—Raghubar v Bahadur Hazam 3 C WN 16 ckxviv Raghunath v Pate Acer 6 C W N 345 (346), Ocharam v Delatram 28 Bom 644 (616). Where on an

application for letters of administration by the husband to the estate of his deceased wife on the allegation that part of the property was a januluka strukhan an issue was raised as to the nature of the property held that the issue ought not to be allowed to be raised on such application as the practice of the Court was not to go into the question of title—Nishi Kant v Ashutosh (supra). In the grant of letters of administration it is not usual to go into the question of title but when the applicant shows that he has some beneficial interest prima facte in the estate sought to be administered it would give that person a right to ask to be appointed to administer the estate. But letters of administration should not be granted to any one when the dispute as to the ownership of or succession to the property left by the deceased can only be settled by a regular suit—Man Singh v Sonit 50 IC 964 (965 966) (Lah)

Questions whether the testator is Mahomedan or Christian his relationship and his disposing power over the subject matter of the will are irrelevant in probate proceedings. If in fact on such a contest the Court proceeds on the assumption that the testator was either Mahomedan or Christian or that he was in a particular relationship to one of the parties such assumptions do not in any slight degree russe any presumption thereafter that the assumptions are correct.

A Mahomedan will can be admitted to probate although it purports to deal with more than the share over which the testator has disposing power II however more than that share is disposed of by the will the position of the executor with regard to the excess will be different in kind from what it would be if the testator had power to dispose of the whole The Court of probate has no jurisdiction to determine any such question or any other question of title—Kurrutulan v Nazaba ud doula Abbas Hossen 33 Cal 116 32 1 A. 244 9 CWN 938 Nathon v Nazbon AIR 1930 0uth 272 Culten v Elkins 9 NLR 152 21 IC 599 Abdul Rashid v Minha ul Hasan AIR 1938 Nag 173

The object of proceedings under this section is to determine the question of representation of the deceased for the purpose of administering the estate and not to determine question of inheritance. The Court should not enter into the question of adoption in such proceedings—Ma Shan v Ma Chin 10 Bur L T 184 44 I C 188. But where the case is such that if the caveator establishes his adoption he would totally exclude the applicant from inheriting the question of adoption must be gone into—Nga Ba v Nga Pa 33 I C 659. Thus where the full isster and the alleged adopted daughter of the deceased whose adoption was disputed applied for letters of administration it was held that inastmich as in the event of the adoption being established the sister would not under the Buddhist law be entitled to any share in the estate the Court would be justified in going into the question of adoption—Anng Ma v M<sub>I</sub> Ah I Bur L T 6 45 1C 737.

Where rival applicants apply for the letters of administration one of whom is admittedly entitled to a share in the estate under this section and the status of the others is disputed the Court should grant letters to the person whose status is admitted—Shue 1 in v. Ma~Die~12. Bur L.T. 39 45 I.C. 935 Ma~The v. Ma~Die~5 ii.C. 64. Thus, letters of administration were granted in a case to A who was admittedly a wife of the deceased and who was entitled to a portion of the deceased estate. The grant was opposed by B who also claimed to have been married to the deceased but whose marriage was denied. There was not sufficient evidence on the record to prove the marriage of B with the deceased. Held that the question of B is marriage with the deceased of B with the deceased.

should be fought out in a regular suit and that the letters of administration were properly granted to A under this section—Naramamah v Ramanath 4 Bur LT 129 12 1C 883 (884)

Mishomedan disposing entire property by will.—Probate —
A Mahamedan will can be admitted to probate although it purports to deal
with more than the share over which the testator has disposing power. If
however more than that share is disposed of by the will the position of the
executor with regard to the excess will be different in hand from what it would
be if the testator had power to dispose of the whole. The Court of probate
has no jurisdiction to determine any such question or any other question of
title—Abdul Rashid y Minha ul 175 1C 897 A IR 1938 Nag 173

243 Joint administrators — It several persons apply for letters of authoristration sub-section (2) gives a discretion to the Court to grant administration to any one or more of such persons. But the Court at all times prefers a sole administrator to joint administrators and it is only when the circum stances are sufficiently strong that it will be induced to exercise sits discretion in favoir of a joint grant—In re leshwantibus 31 Bom LR 999 AIR 1929 Rom 397

Limited letters -If Hindus take out grant of administration letters of administration limited to certain property of the deceased cannot be granted -In re goods of Ram Chand 5 Cal 2 This section contemplates the grant of administration of the whole estate and not of a portion. It would lead to great inconvenience to grant separate letters of administration for separate portions of one estate to all the various heirs of the deceased-Mahima v Sarajubala 9 CL I 576 1 IC 140 (141) The Probate and Administration Act contains no provisions of giving letters of administration in respect of only a part of the testator's estate. It is true that an executor who has been appointed by the testator for the administration of a particular fund is competent to take out probate limited to that particular fund but where there is no direction as to any particular fund and where the applicants apply in their capacity as heirs there is no provision of law which empowers the Court to refuse administration of the whole estate and to limit it to a fractional undivided portion thereof-Sarada Prasad v Triguna Charan 3 PLJ 415 (416 417) For an exception to this rule see In the goods of Couer Suttia Arishna 10 Cal 554 where letters of administration limited to the Government securities and cash alone of a deceased Hindu's estate were directed to issue in view of the special circum stances of the case.

But letters of administration with the will annexed may be granted of a part of the property covered by the will in respect of which the petitioner applies for the grant—Gurbachan v Satuant 26 PLR 608 AIR 1925 Lah. 493 90 IC 620

Section 200 Act % of 1865 Where deceased is not a person belonging to any of the Buddist Skh Jama or carmpted person.

Liner by marriage or by consanguing the state of the section of

mty, are entitled to obtain letters of administration of his estate and effects in the order according to the rules here mafter stated, namely —

(a) If the deceased has left a widow, administration Section 201 shall be granted to the widow, unless the Court sees cause 1865 to exclude her, either on the ground of some personal disqualification, or because she has no interest in the estate of the deceased

#### Illustrations

(1) The widow is a lunatic or has committed adultery or has been barred by by marriage settlement of all interest in her husband's estate. There is cause for excluding her from the administration

(a) The widow has married again since the decease of her husband. This

is not good cause for her exclusion

(b) If the Judge thinks proper, he may associate any  $^{\rm Section\,202}$  person or persons with the widow in the administration who 1865 would be entitled solely to the administration if there were no widow

(c) If there is no widow, or if the Court sees cause Section 203, to exclude the widow, it shall commit the administration to Act X of the person or persons who would be beneficially entitled to the estate according to the rules for the distribution of an intestate's estate

Provided that, when the mother of the deceased is one of the class of persons so entitled, she shall be solely entitled to administration

(d) Those who stand in equal degree of kindred to Section 204 the deceased are equally entitled to administration

(c) The husband surviving his wife has the same right Section 205 of administration of her estate as the widow has in respect Act X of of the estate of her husband

(f) When there is no person connected with the de-Section 206 ceased by marriage or consanguinity who is entitled to Act X of letters of administration and willing to act, they may be

granted to a creditor

- (g) Where the deceased has left property in British Section 207 India, letters of administration shall be granted according Act V of to the foregoing rules, notwithstanding that he had his domicile in a country in which the law relating to estate and intestate succession differs from the law of British India
- Note \_In Illustration (1) the word adultery has not that limited meaning given to the offence in the Indian Penal Code. (In fact there can be no such thing as adultery by a widow under sec. 497 I P Code). The word adulters in this Illustration has the ordinary meaning of sexual intercourse with a man whether married or unmarried-Granamani v Esunadian A.I.R. 1928 Mad. 797 110 I C. 439

Clause (d)—Joint administrators —The Court prefers a sole to a joint administration because it is much better for the estate and more convenient for the claimants on it—Warusek v Greuille 1 Phillim 126 Stanley v Baines 1 Hagg 222 and a fortion the Court never forces a joint administration upon unwilling parties—Bell v Timismood 2 Phillim 22 In the goods of Dickinson [1831] P 292

Clause (d) of this section simply lays down that those who are in equal degrees of kindred to the deceased are all from that point of view alone equally entitled to be appointed administrators but it does not say that they are all entitled to be appointed sositive. There is nothing as this Act which makes it obligators upon a Court to grant letters of administration to all persons who may be entitled thereto merely by reason of their nearness of kin to the deceased Special circumstances should be made out before granting joint letters of administration The Court should prefer a sole to a joint administration and even where several persons stand in the same degree of kinship to the deceased it is the rule to select one only the selection being made according to certain recognized principles. The interest of the estate which has to be administered and the interest of the parties entitled thereto must be primarily looked to and other things being equal a person with business capacity and experience will be preferred to one who has none. Where two persons are equally entitled to consangumity preference will frequently be given to the person chosen by the majority of those entitled to the distribution of assets although other considera tions may be sufficient to overrule the wishes of the majority of those interested A son as a rule will be preferred to a daughter and where none of the usual tests can be applied the Court frequently appoints the applicant who is first in the field-Stoney v Stoney 2 Pat 508 (512 513) 4 PLT 251 AIR 1923 Pat 348 Where the applicants for administration are quarrelling among them selves and are antagonistic to each other the administration of the estate is likely to suffer if both of them are appointed jointly. In such a case adminis tration will be granted to one person only even though the claimants by reason of kinship are equally entitled to it-Stoney v Stoney supra (at pp 513 515)

Section 14 Act V of 1881 Section 191 Act X of 1865 **220** Letters of administration entitle the administration states of letters of ad to all rights belonging to the intestate in the administration had been granted at the moment after his death

245 An administrator may have an action of trespass or trover for the goods of the intestate taken by the defendants before the letters have been granted unto him otherwise there would be no remedy for this wrong doing —Tharpe v Stallwood 5 M & Gr 760 Foster v Bates 12 M & W 233 (Per Park B) So where goods had been sold after the death of an intestate and before the grant of letters of administration acowedly on account of the estate of the intestate by one who had been his agent it was held that the administrator might ratify the sale and recover the price from the vendee in assumpsit for coods sold and delivered—Foster v Bates 12 M & W 226

But although the letters of administration relate back to the time of the death of the intestate and not to the time of granting them: it should be noted that the property of the deceased does not vest in the administrator before the grant of administration because he is a person appointed by the Court and derives his title wholly from the Court—Antoney v. Makis 34 Mad 395 (397) 20 M.L.J. 984. Woolley v. Clarke 5 B. & A. 745. Chetty v. Chetty [1916].

AC 603 Since the property does not vest in the administrator until the grant of letters of administration the heirs of the intestate have the power to deal with the property until the appointment of an administrator and their transac tions in respect of the property will not be invalidated by the subsequent appointment of an administrator-Antony v Makis (supra)

This section and the next refer to cases where letters of administration have been granted to the estate of an intestate. Where on the other hand letters of administration have been granted not upon intestacy but with a copy of the will annexed the first portion of sec 12 (now sec 227) is applicable-Charu Chandra v Nahush Chandra 50 Cal 49 36 CL J 35 AIR 1923 Cal 1

Letters of administration do not render valid Section 15 Acts not validated by any intermediate acts of the adminis- Act tator tending to the diminution or Section 192 administration damage of the intestate's estate

1865

246 Intermediate acts -It is settled law that the power of the executor is derived from the will while the power of an admini trator is derived from the Court and nothing can be done by him until the administration is granted-Wankford v Wankford 1 Salk 301 Creed v Creed (1913) 1 Ir R 48 A person to whom letters of administration are subsequently granted is an absolute stranger to the estate till the grant. A mortgage executed by an adminis trator after an order for grant to him of letters of administration but before their issue is therefore not binding on the estate-Bahuria Ram v Bindesuari AIR. 1936 Pat 41 159 IC 342 Thus he cannot commence action at law before the grant of letters-Marien v Fuller Comb 371 Wooldridge v Bishop 7 B & C 406 So also an assignment of surrender of a lease by an administrator before letters is not void-Rex v Great Clenn 5 B & Adol 188 A mortgage executed by an heir who afterwards becomes an administrator does not bind the estate of the deceased but is binding only on the estate of the executant-Hiat Buksh v Debendia 29 CLJ 53 49 IC 532

But cases may be found where the letters of administration have been held to have a relation to the death of the intestate so as to give a validity to acts done before the letters were obtained. Thus if a man takes the goods of the intestate as executor de son tort and sells them and afterwards obtains letters of administration the sale is good by relation and the wrong is purged -Kennick v Burgess Moor 126 Foster v Bates 12 M & W 226 But such acts would be validated only in those cases where the acts done are for the benefit of the estate See Morgan v Thomas 8 Exch 302 Louisa v Coelho 31 Mad 187 An acknowledgment of hability made by a person who afterwards becomes the administrator is not valid because such an act as the administration of a debt due from the deceased's estate would certainly tend to the diminution of the estate-Raja Rama v Fakruddin 53 Mad 480 AIR 1930 Mad 218 (220) 122 I C 504 But after the grant of letters of administration the ad ministration represents the estate of the deceased (sec 211) and he can do every thing which the deceased could have done and can therefore acknowledge the decea ed s debts and can even promise to pay time barred debts-Pestonji y Bas Meherbas 30 Bom LR 1407 AIR 1928 Bom. 539 (544)

This section does not apply where the intermediate act was done by an herr of the deceased who subsequently obtained letters of administration. Thus an acknowledgment of liability made by the heirs, who afterwards obtained a

THE INDIAN SUCCESSION ACT grant of letters would not be invalidated by this section because as heirs they stant to return busine not or invaniance of the section occasion and would be hable for the debts of the deceased to the extent of the assets received by them as heirs and this hability would in no wise be affected by the subsequent oy them as neus and this naturity wound in no wise of anti-cu oy the grant of letters of administration—Raja Rama v. Fakruddin supra -

Section 6 Act V of 1881 Section 181 Act \ of

(1) Probate shall be granted only to an execu-Probate only to ap tor appointed by the will pointed executor sary implication

(2) The appointment may be expressed or by neces-

1865 Section 7 Act V of 1881 Section 182 Act \ of

1865

(1) A wills that C be his executor if B will not B is appointed executor by implication

by implication

(ii) A gives a legacy to B and several legaces to other persons among the constitute and appoint B my whole and sole executinx by implication

by implication

Test to his daughter in law C and adds but should the within named C be not appointed executinx by implication

The property of appointed executive by implication properties of the first and coducts and the nephray resulting properties of the first and coducts and the coduct are these words — I appoint to discharge all landful demands engines for the coducts and the coducts are coducted to the coduct and the coducts are coducted to the coduct and the coducts are coducted to the coduct and the coduct are coducted to the c

nephew residuary legatee and in another codicil are these words— I appoint my nephew my residuary legatee to discharge all las ful demands against my will be appointed to the contract of the my nephew my residuary legatee to discharge an iawim demands against my will additional against my will be nephew is appointed an executor by

Probate to appointed executor — Generally speaking all 247 Frobate to appointed executor— occurately speaking au persons who are capable of making wills and some others besides are capable persons who are capaose or mandate white and some owners occases are capaose of being made executors. From the earliest time it has been a rule that every of peing made executors. From the carriest time it has been a rule that every person may be an executor saving such as are expressly forbidden.—Williams person may be an executor saving soul as are expressly torsiouen—yumans on Executors 11th Edn. p. 152. Where a member of a firm has been appointed on executors the property a memor of a min mas been appointed executor without specification of name the person who applies for probate executor without specification of name the person who apputes for product claiming to be a member of the firm mentioned by the testator must prove that claiming to be a member of the firm both at the date of the will and at the time of the he was a member or one sum bour at the state of the was and at the some of the state of the was and at the some or the state of the was and at the some or the state of the was a state A I R 1925 Cal 606

in infant may be appointed executor how youngsoeser he be and even a un iniant may be appointed executor now soungsoeter ne be and even a child in tentre sa mere (who is considered in law to all intents and purposes child in tentre sa mere (who is considered in law to all intents and purposes a actually born)—Williams p 153. But of coarse probate cannot be granted as actually born)—Williams P 123 Dur of GUATE PRODUCE Cannot be granted to him until he attains majority (see 223) and in the meantime letters of to nim until ne attains majority (see (200)) and in the meantime setters of administration with the will annexed may be granted to his guardian (see 241)

Under this section probate can be granted only to the executor appointed Under this section probate can be granted only to the executor appointed by the will if the executor dies before obtaining probate, it cannot be granted by the win it the executor thes better containing property it cannot be granted to his heir. The words of the section show that the right to obtain a probate to his near the words or an a section many treat the right to obtain a process is conferred only on the executor and can be no means devolve upon the first 13 conterted only on the executor and can by no means devote upon the heat of the executor—Phekm v. Manks 9 Pat 633 AIR 1830 Pat 618 (619) of the executor-phasm y mansi y rat one alter than rat one total Sarat Chandra y Nam Mohan 36 Cal 799 (800) But the provision as to Series of administration is not so stringent. See see 233 page 262 Post

ers of administration is how so subspecific are set and page one post.

Persons convicted of crimes are not disabled from being executors and Persons convicted of crimes are not unabled from occur executors and therefore it has always been held that persons atta it outlaned may sue deceased. And it has been the testator's death const suit in a Court of Proba which he is apointed excl fit of the persons is not the forfe ted by the conviction cutor and after establishit to maintain a s of ice f the will by Smeth

out was not Sw & Tr

143 So also the Court will not pass over an executor by reason of his bad character only—In the goods of Samson L R 3 P & D 48 The Court cannot refuse to grant probate of a will to a person appointed executor on account of his poverty or insolvency—Rex v Sir Richard Rames 1 Salk 299 so also mere weakness of mind is not sufficient to disqualify a person from being appointed executor—Evans v Taylor 2 Rob 131

Residuary legatee A residuary legatee as such cannot obtain probate-Goods of Soshee Bhusan Banerjee 19 Cal 582

Court of Wards —It was held in the case of Gangessar Koer v Collector of Patna 25 Cal 795 that the Court of Wards was not a person to whom probate or administration could be granted See also Trojlucko Nath v Administrator General 10 CWN 241

- 247 (1) Application for probate by e-ecutor if any when can be refused -There is no provision in this Act which enable the District Judge to refuse an application for probate by an executor named in the will and consi dered qualified by the testator to act as su a on the ground that in the opinion of the Judge he is not a fit and proper person to be entrusted with that office -Hara Coomar v Doorga Mont 21 Cal 195 Karıman v Masiti 24 PLR 1912 13 I C 171 (172) The Court cannot refuse probate to an executor appointed by the will because it considers him to be an unfit person unless the unfitness is of the nature of legal incapacity se minority or unsoundness of mind (sec 223)-Venkataramier v Govindaravalier 23 LW 462 AIR 1926 Mad 605 (606) 94 IC 73 It would not be right to refuse probate to an appointed executor on the ground that on a previous occasion he had contested the due execution of the will -Sailabala v Baidya Nath 32 CWN 729 (730) 110 I C 542 AIR 1928 Cal 580 If the applicant is an executor named by the will and is under no legal incapacity to act the Court has no option but to grant him probate sec 85 (now sec 298) of the Act enacts that it is within the discretion of the Court to refuse to grant an application for letters of administration but no such discretion is given in regard to an application for probate by a person selected by a testator for the administration of his estate-Pran Nath v Jado Nath 20 All 189 (191) Hotchand v Navairas 121 IC 173 AIR 1930 Sind 91 (93) The Court cannot refuse probate to a person appointed as executor (who is the testator's own son) merely because all the rest of the family are very much chagrined at him and are making foolish charges against him one of the charges being that he has taken posse sion of the properties of the testator-a thing which he was bound and entitled to do as executor -Bardyanath v Rajendranath 52 CLJ 66 AIR 1930 Cal 803 129 IC 879
  - 247A Considerations for grant of probate of Will —Where a will is propounded the onus probands is on the party who propounds the will. It is for him to show that it is the act of the testator and the first point to be ascertained is whether the will was duly executed. If due execution is estab lished the next point for consideration is whether at the death of the testator the will was in existence and if it was not then the ordinary prima facie presumption is that it was destroyed by the testator with intention to recoke. This presumption is one which is always rebuttable by the production of further and other evidence. Where the mental capacity of the testator is challenged by evidence to the iffect that it is very doubtful whether the testator state of mind at the time of the execution was such that he could have duly executed the will in question the Court must be satisfied before granting probate that the testator was of sound di posing mind and did know and approve of the contents of the will.

In considering whether a will should be admitted to probate or not it is of the very first importance to remember at the time and always that a will is not to be presumed to be a forgery primarily from a consideration of its contents, nor is it permissible for Court to hold that the contents of the will are so extra ordinary that the Court may safely allow that circumstance to over balance the direct or positive evidence as regards the execution of the will. In other words, it is not permissible for the Court to do what Courts are often invited to do on behalf of objectors namely to make up the mind of Court about the iniquitous character of the contents of a will and then to look at the positive or direct evidence in favour of the execution of the will from that standpoint—Jotindra Nath v. Roi. Lashhum 57 CL.1.8

248 Appointment express or implied —The appointment of an executor may be either express or constructive, in which case he is usually called executor according to the tenor for although no executor be expressly norm nated in the will by the word executor yet if by any word or circumlocution the testator recommend or commit to one or more the charge and office or the rights which appertain to an executor it amounts to as much as the ordaning or constituting him or them to be executors. As if he declares by his will that A B shall have his goods after his death to pay his debts and otherwise to dispose at his pleasure or to that effect by this A B is made executor—Swinburne Pt 4 s. 4 Pt 3 cited in Williams 11th Edn p 159

Where certain persons were directed by the will to pay debts funeral charges and the expenses of proving the will they were held to be clearly executors according to the tenor-In the goods of Fry 1 Hagg 80 So where the testator in a codicil said. I appoint my nephew my residuary legatee to discharge all lawful, demands against my estate the nephew was admitted to be executor-Grant v Leslie 3 Phillim 116 Where a will stated. It is devised that my nephew R is to discharge the debts due by me to the world it was held that the nephew was an executor by implication-Viramma v Seshamma 54 Mad 226 AIR 1931 Mad 343 (344) 132 IC 127 Where by a will a testator said I appoint A B C and D but did not state in what capacity he appointed them and also bequeathed legacies to each of my executors and gave to his said executors the residue of his property with certain directions as to it the Court held that by the words of the will A B C and D were appointed executors-In the goods of Gradley 8 P D 215 The testator by a codicil directed that his first wife was to carry on all his affairs as his sole executrix and to recover the house rents and all momes advanced by the testator. She was also to distribute certain monies annually for defraying certain specified charity expenses in case of her death the said affairs and the distribution of money so mentioned were to be conducted by his second wife Held that the testator intended his second wife to carry on his affairs and also to pay his debts and legacies under the will and so she was an executrix according to the tenor and entitled as such to probate after the first wife's death-Mithibas v Canji 26 Born 571 (575) 4 Born L R 9 A person who though not expressly appointed as executor is directed to receive and pay the testator's debts and to get in and distribute his personal estate must be taken to have been appointed under the will as executor by amplication-In the matter of Monohur Mookeriee 5 Cal 756 7 CLR 228 In the goods of Courson 25 Cal 65 (72) Where a will provided I appoint my sons S R and H and on behalf of my minor son and grand son their mothers respectively as executors this was tantamount to appointing the minor as executors by necessary implication and their mothers would act on

their behalf during their minority-Hari Chaitanya v Ram Ram AIR 1928 Cal 164 (165) 105 IC 626

But unless the Court can gather from the words of the will that a person named therein is required to pay the debts of the deceased and the legacies and generally to administer the estate it will not grant probate to him as executor according to the tenor thereof-In the goods of Punchard LR 2 P & D 369 In the estate of Mackenzie [1909] P 305 Ameer Chand , Mohanund 6 CLJ 453 Mithibas v Canji 26 Bom 571 (575) When an executor is nominated according to the tenor it must be clearly shown that from the terms of the will it was the testator's intention that that person should be an executor and when there is an express appointment of another person as executor it is less probable that the first named person is indirectly appointed as an executor And so where the widow has been directed to pay a legacy to her step daughter and to carry on the business in the testator's shop but there is also appointed another person expressly as executor to see that the directions made to the widow as well as other directions in the will are carried out it must be concluded that the widow was not made an executor according to the tenor of the will-Gnana mans v Esunaddian AIR 1928 Mad 797 (798) 110 IC 439 So also a direction in a will to a person to pay the testator's debts or funeral expenses out of a particular fund and not out of the general estate does not constitute such person executor according to the tenor -In the goods of Davis 3 Curt 748 In the goods of Toomy 3 Sw & Tr 562 Auppayammal v Ammant 22 Mad 345 (356) So again where the whole personal estate was left to a trustee on trust for a specific purpose and no executor was named in the will it was held that such trustee was not entitled to probate as executor according to the tenor-In the goods of Jones 2 Sw & Tr 155 Where a property was left by will to certain persons who were to act as trustees for two sets of properties but the will gave them no power whatsoever to do any of the duties necessarily apper taining to the office of executor held that they could not be treated as executors according to the tenor and were not entitled to probate-Appacooty v Muthu Kumarappa 30 Mad 191 A Hindu executed a will leaving the bulk of his property to his minor daughter and appointed his mother as her guardian. He left a piece of land to his mother and disinherited his wife for misconduct. The will stated that the mother should have full right to spend the income but not to spend the principal. No specific duties were laid upon the mother, excepting that she should feed the poor on death anniversaries. It was held that these facts were quite insufficient to make the mother an executrix by implication-Lado : Sibhag Rans 28 PLR 220 AIR 1927 Lah 770 102 IC 194 The mere fact that there are certain dispositions of property and legacies in the will has not the effect of making the legaters executors by implication-Kolare mathu v Madhat: 1927 MWN 894 AIR 1928 Mad 243 108 IC 408 The mere fact that a person is appointed a shebait or trustee of the whole or a large portion of the estate of the testator is not sufficient by itself to constitute him an executor by implication. But where the testator uses the word trustee or shebart and at the same time imposes on the person duties involving the functions of an executor there is a good appointment as executor by necessary implication-Ameer Chand v Mohanund 6 CLJ 453 (457 460) Brojo Chander Raj humar 6 C.W.N 310 Krepamoys v Mohim Chandra 10 C.W.N 232 (234)

Where a testator in his will mentions the names of certain persons and adds that they are to take care of his properties till his proposed adopted son attains majority the will does not appoint them as executors by implication123

TCu

Seshamma v Chennappa 20 Mad 467 Where a will provides that certain persons shall remain trustees that is guardians and next friends till the devisee attains majority no executorship is created by implication-Gopal Das v Budree Days 33 Cal 657 10 CWN 662

The mere fact that a testator directs his eldest son to deal with a certain house as the trustee of a m nor son in the event of the testator's death during such minority is not sufficient to indicate that the eldest son was appointed generally to act as executor of the will-In re Mohamed 7 LBR 266 25 IC 620 (821)

It should be noted that the appointment of executors by necessary impliention is not to be favoured and the language of the will is not to be trained for that purpose but in doubtful case letters of administration with the will annexed sucht to be granted-tyreer Chand v Mohanund 6 CL J 453 (460)

Lost will-Probate of -Where ? will is lost probate may be granted after the Court is fully satisfied with the priof of due execution and attestation of the in trument and the contents thereon-Brown v Brown & E & B 876. Kedar Saranni 3 CWN 617 In case where the will is not forthcoming probate may be granted of a codicil which remain unrevoked-Black v folling 1 P & D 685

Probate cannot be granted to any person who is a minor or is of unsound mind nor Person to wohm proto any association of individuals unless bate cannot be granted it is a company which satisfied the con-

ditions prescribed by rules to be made by the Provincial Government in this behalf

248A. Changes -The words nor unles the deceased was a Hindu Muhammadan Baddhist Sikh or Jama or an exempted person to a married nomen without the previous consent of her husband, which occurred after the word mind have been omitted by the Indian Succession Amendment Act XVIII of 1927

Those word have also been omitted from .ec 236 which enunciates a similar rule in the case of administrators. Pr or to this amendment probate

or letters of administration could not be granted woman who was of her husband without the not a Hindu or Mul sion Act 2 d on the English This provision of the meser the a has considerably law as it then existed It is desirable thanged and the cor 18 700 1 amendments of with E to bring the Indian I 236 of ti Act B accordingly ecs. 223 1927 Part ment e ns (( prorv p 2 in Cour 10

1931 ( 710 ın thi rte W. 21 have t

in sec 17 of the Administration of Justice Act 1920 and sec 161 of the Supreme Court of Judicature (Consolidation) Act 1925 the grant of probate is made to a corporation when the same has been named as executor in a will It is considered that provision should be made in the Indian Succession Act 1925 authorising the grant of probate and letters of administration to a company on the lines of the provision in the English law. It is accordingly proposed to amend secs. 223 and 235 of the Indian Succession Act.—Statement of Objects and Reasons.

The words Provincial Government have been substituted for Governor General in Council by the Government of India (Adaptation of Indian Laws) Order 1937

Probate to minor —There can be no objection to a minor being appointed extention but probate cannot be granted to him in such a case letters of administration with will annexed (but not probate) may be granted to his guardian during his runority (sec 244) or he may obtain probate after attaining majority —Hari Chaitanja v Ram Ram Al R 1928 Cal 164 (165) 105 IC 626 Bhak Mal v Malik Al R 1931 Lah 229 (231) 131 IC 302

Executor's refusal to accept office—Remedy and effect —
There is nothing to preclude an heir in law from maintaining an action in eject
ment or otherwise recovering possession of the estate left by a testator where
the executor appointed under the will of the testator decline to accept office
The entire estate both morable and immore cible property left by the deceased
must be deemed to vest in the heir at law until an administrator is duly constituted. The h ir at law is he lakes, can get himself appointed administrator
but he is not bound to do so. It is open to legatees to have an administrator
duly constituted and as soon as an administrator is constituted the estate would
be divested from the heir at law and the person competent to maintain a suit
on behalf of the estate would then be such administrator. According to the
plain language of sec 17 Limitation Act. legal representative would also include
an heir. The term is not confined to an executor or administrator—Sit asankara
v Amarat alt. 174 I C 63 A IR B 1938 Md 157

Grant of probate to several executors are appointed, probate Section 9 may be granted to them all simulta1881 1881 1880 in meously or at different times several executors simil taneously or at different times are several executors. Section 184 1881 1885 in 1865 in 186

#### Illustration

A is an executor of Bs will by express appointment and C an executor of it by implication Probate may be granted to A and C at the same time or to A first and then to C or to C first and then to A

249 Several executors —If the will be proved and the applicant is an executor named in the will and is under no legal incapacity to act the Court has no discretion but must grant probate to such executor even if it has been previously granted to his co executor—Pran. Nath v Jadu. Nath. 20 All 189 So where probate has been granted to some of the executors appointed by a will without citation upon the other calling upon them to accept or renounce their executorships the latter can apply for probate and obtain it—Pean Lal v Behn Behan 45 IC 336 (Cal). And in such a case probate should be granted to the subsequent applicants jointly with the executors to whom the probate has already been granted—Ishwer Sugh v Harksiken 42 P.L.R. 1913 18 IC 16 (17) Where a testator appoints an executor and provides that in

Seshamma v Chennappa 20 Mad 167 Where a will provides that certain persons shall remain trustees that is guardians and next friends till the devisee attains majority no executorship is created by implication—Gopal Das v Budree Dass 33 Cal 657 10 CWN 662

The mere fact that a testator directs his eldest son to deal with a certain house as the trustee of a minor son in the event of the testator's death during such minority is not sufficient to indicate that the eldest son was appointed generally to act as executor of the will—In re Mohamed 7 LBR 266 25 IC 2820 (821)

It should be noted that the appointment of executors by necessary implication is not to be favoured and the language of the will is not to be strained for that purpose but in doubtful cases letters of administration with the will annexed ought to be granted—Arveer Chand v. Mohamund 6 C.L.J. 453 (460)

Lost will—Probate of —Where a will is lost probate may be granted after the Court is fully satisfied with the proof of due execution and attestation of the instrument and the contents thereof—Brown N Bonn N B & B 876 Redar v Sarojum 3 CWN 617 In case where the will is not forthcoming probate may be granted of a codicil which remains unrevoked—Black v Jobling 1 P & D 685 v

Section 183 Act X of 1865 Section 8 Act V of 1881 Persons to wohm pro bate cannot be granted to any person who is a minor or is of unsound mind not to any association of individuals unless it is a company which satisfied the con-

ditions prescribed by rules to be made by the Provincial Government in this behalf

248A Changes —The words nor unless the deceased was a Hindu Muhammadan Buddhist Sish or Jaina or an exempted person to a married woman without the previous consent of her husband which occurred after the word mind have been omitted by the Indian Succession Arrendment Act VVIII of 1927

Those words have also been omitted from ec 236 which enuncrates a similar rule in the case of administrators. Prior to this amendiment probate or letters of administration could not be granted to a married woman who was not a Hindu or Muhammadan without the previous consent of her husband. Thus provision of the Indian Succession Act 1865 was based on the English law as it their existed. Since 1865 however the law in English has considerably changed and the consent of a husband is no longer necessary. It is desirable to bring the Indian law into conformity with English law and amendments of sees 223 and 236 of the Indian Succession Act with this Object are accordingly proposed. Statement of Objects and Reasons (Gazette of India 1927 Part V p. 221).

The words nor to any association by the Governor General in Council in this behalf were inserted by the Indian Succession Amendment Act 1931 (Act AVII of 1931) A similar amendment has been made in sec 236 The reasons have been this stated—

Sections 222 and 224 of the Indian Succession Act 1º25 provide for the grant of probate to an executor or to everal executors simultaneously or at different times. It is not however clear whether under that Act probate may be granted to a corporation or rot Linder the English law which is contained.

times

in sec. 17 of the Administration of Justice Act. 1920, and sec. 161 of the Supreme Court of Judicature (Consolidation) Act 1925 the grant of probate is made to a corporation when the same has been named as executor in a will It is consi dered that provision should be made in the Indian Succession Act 1925 authorising the grant of probate and letters of administration to a company on the lines of the provision in the English law It is accordingly proposed to amend secs. 223 and 235 of the Indian Succession Act -Statement of Objects and Reasons

The words Provincial Government have been substituted for Governor General in Council by the Government of India (Adaptation of Indian Laws) Order 1937

Probate to minor -There can be no objection to a minor being appointed executor but probate cannot be granted to him in such a case letters of administration with will annexed (but not probate) may be granted to his guardian during his minority (sec 244) or he may obtain probate after attaining majority -Hars Chastanya v Ram Ram AIR 1928 Cal 164 (165) 105 IC 626 Bhak Mal v Maisk A I R 1931 Lah 229 (231) 131 I C 339

Executor's refusal to accept office-Remedy and effect -There is nothing to preclude an heir in law from maintaining an action in eject ment or otherwise recovering possession of the estate left by a testator where the executor appointed under the will of the testator decline to accept office The entire estate both movable and immoveable property left by the deceased must be deemed to vest in the heir at law until an administrator is duly constituted. The heir at law if he like can get himself appointed administrator but he is not bound to do so. It is open to legatees to have an administrator duly constituted and as soon as an administrator is constituted the estate would be divested from the heir at law and the person competent to maintain a suit on behalf of the estate would then be such administrator. According to the plain language of sec 17 Limitation Act legal representative would also include an heir The term is not confined to an executor or administrator-Sivasankara v Amarat aths 174 I C 638 A I R 1938 Mad 157

224 When several executors are appointed, probate Section 9 Grant of probate to may be granted to them all simulta- Act V of several executors simul neously or at different times taneously or at different

Section 184 Act X of 1865

#### Illustration

A is an executor of Bs will by express appointment and C an executor of it by implication Probate may be granted to A and C at the same time or to A first and then to C or to C first and then to A

Several executors -If the will be proved and the applicant is an executor named in the will and is under no legal incapacity to act the Court has no discretion but must grant probate to such executor even if it has been previously granted to his co executor-Pran Nath v Jadu Nath 20 All 189 So where probate has been granted to some of the executors appointed by a will without citation upon the other calling upon them to accept or renounce their executorships the latter can apply for probate and obtain it-Pean Lal v Been Behars 45 IC 336 (Cal.) And in such a case probate should be granted to the subsequent applicants jointly with the executors to whom the probate has already been granted-Ishuar Singh v. Harkishen 42 PLR 1913 18 I C 16 (17) Where a testator appoints an executor and provides that in the exent of his death another should be substituted then on the death of the original executor though he has proved the will the executor directed to be substituted may be admitted to the office of the originally appointed executor if it appears to have been the testators intention that the substitution should take place on that exent whether happening during the lifetime of the testator or afterwards—Muthiban Comp 26 Bom 571 (576) 1 Bom LR 9 If several minors are appointed executors probate may be granted to them at different times as and when each of them attains majority and applies for probate—Han Chattarna v. Ram Ram 165 IC 626 ATR 1928 Cal 164 (165)

If the will appoints several executors and directs them to act unanimously or by a majority and some of them refuse to act as executors the remaining executors can apply for probate—Hoteland v. Au alia: A IR 1930 Sind 91 121 IC 173 Where of several executors some alone applied for probate it was held that the executors who had not proved could call for inventory and account from those who had proved the will and were managing the estate—Jehangi v. Bai hukbba 27 Bom 281 S Bom LR 131

Section 10 Act V of 1881 Section 185 Act X of 1865 225 (1) If a codicil is discovered after the grant of Separate probate of probate, a separate probate of that codicil discovered after grant of probate of codicil may be granted to the executor, if it in no way repeals the appointment of executors made by the will

(2) If different executors are appointed by the codicil, probate of the will shall be revoked, and a new probate granted of the will and the codicil together

Section 11 Act V of 1881 Section 186 Act X of 1865 Accrual of representation to surviving executor 2.26 When probate has been granted to several executors, and one of them dies, the entire representation of the testator accrues to the surviving executor or executors.

250 The power of two or more executors is not determined by the death of one for the whole survives to the other or others—Flandris v Clarke 3 Atl. 509 When the right to perform certain religious ceremonies is vested in the executors the other members of the family are not entitled to perform them so long as any of the executors is alive Upon the death of one of those executors his right to perform the ceremonies passes to the other executor or executors and is not transmitted to his heirs—Barada Proshad v Gajindra 13 CWN S57 (567) 1 IC 289

Section 12 Act V of 1881 Section 188 Act X of 1865 227 Probate of a will when granted establishes the will from the death of the testator and renders valid all intermediate acts of the executor as such

What the grant of probate or letters of administration estab is the grant of probate or letters of administration with a copy of the will annexed establishes conclusively the legal character of the person to whom the grant is made by the Probate Court. The grant is not only relevant but conclusive against all. The grant is also conclusive evalence of the validity of

the will—of its due execution—execution without force fraud or undue influence and of the testamentary capacity because the legal character of the propounder is declared (as in the case of an executor) or conferred (as in the case of the administrator) by the Probate Court on the basis of the will

In Williams on Executors Vol I p 381 12th edition the effect of Probate is stated thus — Therefore it cannot be proved that another person was appointed executor or that the testator was insane or that the will of which probate has been granted was forged for that would be directly contrary to the seal of the Court

251 Effect of probate -The probate when produced is said to have relation to the time of the testator's death-Whitehead v Taylor 10 A & E 210 Ingle v Richards 28 Beav 366 The vesting takes place on the taking of probate but it relates back to the time of the testator's death and to the estate which then belonged to him-Gopal Lal v Amulya 59 Cal 911 AIR 1933 Cal 234 (236) When the probate is granted it operates upon the whole estate and by this section it establishes the will from the death of the testator and renders valid all intermediate acts of the executors as such. The property vests in the executors by virtue of the will not of the probate. The will gives the property to the executor the grant of probate is the method which the law specifically provides for establishing the will. So long as the probate exists it 18 effectual for that purpose-Lomol Lochun v Nilruttun 4 Cal 360 (362) This section is intended to be a concise statement of the English law which regards probate as the authenticated evidence of the will itself from which the executor derives his title and by virtue of which the property of the testator vests in him from the death of the testator. But this section is not tantamount to saying that until probate is taken out there is no will at all giving recognition of the disposition made and the authority conferred by it -Shaik Moosa v Shaik Essa 8 Bom 241 (254 255)

When letters of administration are granted with a copy of the will annexed they have the same effect as probate and establish the will from the death of the testator—Charu Chendra v Nuhush Chendra SO Cal 49 (57) A IR 1923 Cal 1 35 CL J 35 Probate and letters of administration with a copy of the will annexed are conclusive evidence of the factum and validity of the execution of the will in the same way as letters of administration are conclusive of the intestacy of the deceased—Rallabonds v Rallabands 31 M LJ 277 35 1C 854 Whicker v Hume (1855) T H LC 124 Re Barraine [1910] 2 Ch 419

The grant of a probate or letters of administration so long as it subsists is conclusive evidence as regards the proper execution of the will and the legal character conferred on the administrator II it is alleged that the probate or letters of administration has or have been wrongly granted the proper course is to apply to the Court which granted the probate or administration to revoke the same under sec 263—Darophi v Sants 116 I C 452 A J R 1929 Lah. 481 (483)

Administration with copy annexed of authen ticated copy of will proved abroad

When a will has been proved and deposited in a Section 5 Court of competent jurisdiction situated Act Vot of will beyond the limits of the Province, Section 180 whether within or beyond the limits of Act Xot Whether within or beyond the limits of 1865 His Majesty's dominions, and a pro-

perly authenticated copy of the will is produced, letters of

administration may be granted with a copy of such copy annexed

Object of the section — The real object of sec 228 is to dispense with the production of the original will owing to its having been deposited in some other Court The section is merely an enabling section and if the Court considers that there is a question to be decided relating to the validity of the will such as the power of the testator to make a will etc the Court is bound to try that question before enabling the executor to act under the will Ram Lal v Chanan Dass 178 IC 224 A IR 1938 Lah 39;

no sec 276) or sec 64 (now sec 278) is a grant made on an application under sec 62 (now sec 276) or sec 64 (now sec 278) is a grant made on an application to establish the will or the representative character of the applicant. But a grant made under the present ection does not partake of the character of a grant of the above nature. It does not pretent to establish either the will or the representative character of the applicant. It is a mere ancillary grant in order to give effi acy to a grant already made. It is not a grant of probate or administration either with or without the will annexed but is merely a grant of administration with a copy of the authenticated copy of the will annexed. An applicant under this section is not required to state the particulars which must be stated by an applicant under sec 276 or sec 278 nor is the application required to be verified under the provisions of sec 67 (now sec 281) nor can a Court making a grant under this section require the applicant to give a bond under sec 78 (now sec 291) or an inventory and account under sec 98 (now sec 317)—Dominisioner v Jegudish 2 PLT 63 63 621 C 513 (521 522)

The grant of administration under this section is discretionary with the Court—Ibid

Foreign will—grant of probate or letters of administration in British India —Probate is granted of a will which is valid by the law of the country in which the testator is domiciled. In In the Goods of Therese Hennetis Aimee Deshus: (deceased) Sir J. P. Wilde observed. To grant probate in common form of a foreign will this Court will be satisfied with prima facie proof that some foreign Court has adopted the document as a valid testament and this without any regard to the form in which such adoption is signified it does not require that the form of approval should be the same as its own grant of probate. In the case of Ir, the goods of the Counters De Vigny (deceased) (1865) 4 Sw. 8, Tr. 13. 34 L.J.P. 58 Sir J.P. Wilde observed. If you can show me any document that purports on the face of it to be equivalent to probate any act of the foreign Court the language of which carness to my mind in any shape or form that the foreign Court has adopted the document as will that will be sufficient for me.

A testatux died at Chandermagore in French territory leaving a will directing distribution of her property. The will was written by notaire of Chandrenagore according to her direction and in her presence and was properly executed and attested by witnesses. The will however was not signed by the testatux as at the time of the will she was ill and was therefore integnable of signing her name or giving her thumb impression. The assets of the testatux comprised a debt due to her from a person living within the jurisdiction of the District Judge of 24 Parganas. An authenticated copy of the will under the seals and signatures of the notaire the presiding Judge of tribunal and the Administrator of Chanderiagore was annexed to the petition for grant of letters of administra

tion. The judicial functionary had endorsed that as the notaire had the function of authenticating will no judgment was necessary to prove the genuireness of the will. The original of the will was kept in notaires office as under French law it could not be parted with. It was held that the will was valid according to the French law and there was sufficient compliance with the provisions of sec, 228—Submir v Raysum AIR 1939 Cal 237.

'Proved and Deposited"-Interpretation -How the expression proved and deposited in sec 228 should be interpreted was discussed by Costello J in the judgment of the case of Sukumar Banerjee v Rajeshwari Debi AIR, 1939 Cal 237 at p 242 as follows - In our opinion in order that justice may be done in cases such as the present one it is necessary and desirable that a reasonable interpretation should be given to the expression proved and deposited so as to bring the practice in this country as far as possible into line with the practice obtaining in England To do otherwise would be create endless difficulties in cases where a foreign testator chose or was obliged for any reason such for example his or her physical condition to make his will by public act or in the form of an olographe will I think we must hold that the word proved as used in sec 228 was not necessarily intended to be the equivalent of admitted to probate or to use a hideous but convenient term which is current in this country probated but to mean authoritatively established as being valid according to the law of the place where it was made

253 Procedure —Where the original will had been deposited and registered in Scotland and in an apphration under this section for letters of administration with a copy of the will annexed a copy certified under the hand and seal of a Notary Public to be a true copy of the original granted by the Assistant Aeeper of the Register of Deeds are produced held that as it did not purport to be a copy made from the original itself and did not bear a certificate that it had been compared with the original it was not a properly authenticated copy of the will within the meaning of this section—In the estate of Adam R Whyte 14 Bur L R. 33

If a foreign will has already been proved and deposted in a competent Court abroad this section following the English law enables a Court in British India to grant letters of administration to the applicant with a properly authent cated copy of such will annexed and thus to dispense with the necessity of proof of the original will but where a foreign will has not been so proved the Judge will have himself to take evidence as to the due execution of the will according to the law of the country in which the testator was domiciled in cases where the property in respect of which probate is sought is moveable or personal property and the validity of a will which purports to dispose of immoveable property in British India must be tested by the rules applicable to the execution of will in British India—Bhagirao v Laksimban 20 Born 607 (610)

This section does not require that the will should remain in Court for all times after it has once been deposited. It is quite sufficient if the will had in fact been deposited in a foreign Court of competent jurisdiction and that the Court had before it the original will at the time it made a judicial pronouncement on the validity of the will according to the law of that country. Moreover the copy of the will required by this section does not necessarily mean a copy authenticated under the seal of the foreign Court a copy authenticated by the notamal seal of a Notary as provided for the judicial process of the foreign

Court 18 a properly authenticated copy within the meaning of this section— Sushilabala v Anukul Chandra 22 CWN 713 (718) 44 I C 166

The executor of the will of a subject of a Native State cannot maintain a suit in British India on the strength of a probate granted by a Native State Court and certified by the Political Agent of the State The plaintiff must take out probate or under this section obtain letters of administration with a copy of the will annexed or a succession certificate—Manasingh v Ahmed 17 Mad 14

Probate Court and Civil Court —The Probate Court is to determine whether a will has been duly executed. The Civil Court is to determine what effect is to be given to a will after probate has been granted. It is not for the Civil Court to question the validity of a will which has been probated—Mahamard y. Sabida 23 CVN 1658. 29 CLJ 37. 49 IC 128.

Section 16 Act V of 1881 Section 193 Act X of 1865

Crant of administration where executor has

not renounced

When a person appointed an executor has not renounced the executorship, letters of secutor has administration shall not be granted to any other person until a citation has

been issued, calling upon the executor to accept or renounce his executorship

Provided that when one or more of several executors have proved a will, the Court may, on the death of the survivor of those who have proved, grant letters of administration without citing those who have not proved

254 Citation —A grant of letters of administration with the will annexed will be revoked under sec 263 if it has been made without a citation being issued to the executor—Hormusji v Bai Dhanbaiji 12 Bom 164. Under this Act there are compulsory citations and discretionary citations. A case of compulsory citation is to be found in this section and a case of discretionary citation arises under sec 283 clause (c). Where the compulsory citation has been omitted the grant of letters of administration with the will annexed would be defective on the face of it because the will is the act of the decreased himself and provides for the persons who shall administer the estate in such a case the grant being defective should be revoked as soon as the defect comes to the notice of the Court. Where however citation is discretionary (sec 283) the mere absence of citation does not invalidate the grant—Digambar v. Narayan 13 Bom.L.R. 38 9 I C 334

The citation required by this section is a special citation calling upon the executor to accept or renounce the executorship. A general citation to the executor to attend and watch the proceedings is not sufficient and the letters of adm nistration granted to the applicant on the executors failure to appear will be set aude—Savienia v. Raplashim 47 Call 383 (841) 60 1C, 574

Unless and until the validity of the will is established the executor is not bound to accept or renounce his executorship. He cannot be compelled to say whether he will accept or renounce the executorship until the will is established 1b J (at p. 812).

An executor called upon by citation to accept or renounce is clearly compeliable if he accepts, to take out probate within the limited time. If he does not do so letters of administration with the will annexed may be granted to any competent applicant—Aatasji v Bai Dinbai 40 Bom 696 18 Bom L R 766

It should be noted that this section applies only to a grant of letters of administration and not to a grant of probate consequently if the will has appointed five executors three of whom refuse to act as executors and the other two apply for probate it is not necessary to issue special citations to the untilling executors to enable them to join in the application if they were so minded. A general citation under sec 283 is sufficient—Hotchand v. Navalrai 121 IC 173 A IR 1890 Sind 91

Form and effect of renunciation may be made or ally in the Section 17 renunciation of execution presence of the Judge, or by a writing 1881 renunciation of executionship when made shall preclude him from Act Not when made shall preclude him from Act Not him executor

255 Renunciation —The office of the executor being a private one of trust named by the testator and not by the law the person nominated may refuse and even if in the life time of the testator he has agreed to accept the office it is still in his power to recede—Williams 11th Edn Vol I p 191 Dosle v Blade 2 Sch & Lef 237

But an executor cannot renounce after he has taken out probate-In the goods of Verga 32 L J P M & A 9 An executor after he has once acted as an executor and administered the estate cannot subsequently renounce and the Court has no power to authorise him to renounce-fackson v Whitehead 3 Phillim 577 Ayeshabas v Ibrahim 32 Bom 364 It is too late to renounce when he has elected to act as executor and he may express such election by acts which amount to an administration. Thus where the executors have been handling the estate and effects of the testator ever since his death and they referred to arbitration a matter connected with the will held that it was an ample indication that they had accepted the office of executors-Inanendra Nath v Jitendra Nath 32 CWN 108 (111) But in a Lahore case Raghbar v Gadodia AIR 1928 Lah 470 (472) 110 IC 506 and in another Calcutta case Brojo Lal v Sharajubala 51 Cal 745 (758) AIR 1924 Cal 864 84 IC 154 the Judge have laid down that Courts in India ought not to follow the English law that a person who has intermeddled with the estate of the deceased is not entitled to renounce but is compelled to take out probate

An executor even after taking the oath of office may renounce before probate is actually granted—Mohamidu  $_{
m V}$  Puchay [1894] A C 437

This section should not be interpreted to mean that a renunciation can only be made when another person has applied for grant of letters of administration and citation has been issued calling upon the executor to accept or renounce his executorship. Section 229 states that when a person has not renounced his executorship there should be citation is sized upon him. This shows that renun ciation can be made by the executor before any issue of citation—Brojo Lal v Sharqiibala 51 Cal 745 (757) AIR 1824 Cal 864 84 IC 154 Gadodia v Raghinbor AIR 1931 Lah 746 (747)

The failure of the executor to attend in pursuance of a citation issued to him on an application for probate or letters of administration made by another

per.on does not amount to a remunciation such failure amounts to renunciation in England but not in India—Raghbar v Gadodia 110 I C 506 A I R. 1928 Lah 470 (471)

An executor cannot renounce in part. He must renounce entirely or not at all-Paule v. Moodie 2 Roll Rep. 132. Doyle v. Blake 2 Sch. & Lef. 239. 245.

The executor can renounce his executorship only in the presence of the United States of the Court that he is renouncing his executorship but it is by his statement in Court that he will stand or fall. Wild statements made outside the Court will not be taken into account—Venkataramier v Govindanayalare A Fit 1925 Mad 665 94 IC 73 23 LW 462. Where the executor merely wrote a letter to a certain person intimating his intention of renouncing probate but no such renunciation was ever directly made before the Court it was held that there was no formal renunciation—In the goods of Manick Lal 35 Cal 156. But a later Madras case expresses the view that the writing signed by the person renouncing need not be made in Court it is sufficient if the renunciation (to whomsoever addressed) is proved to the abisfaction of the Court—Generaman v Esunadian ATR 1928 Mad 797 IUI C. 439.

The word Judge in this section means the Judge of the Probate Court with its sense of the probate or administration proceedings it does not mean any Judge of any Court—Raghbar v. Gadodia supra

The expression writing signed by the person renouncing does not mean the writing should be the handwriting of such person or that it should be addressed to any person. No form of such writing is prescribed and consequently a statement written by the Court and signed by the executor comes within the purview of this section—Roghbar v Gadodia s.pra affirmed Gadodia v Raghubar AIR 1931 Lab 746 (748)

This section lays down that an executor who has renounced the executorship is precluded from obtaining probate of the will. But an executor who merely challenges the genumeness of the will cannot be said to have renounced the executorship. Thus where the executor made a statement in Court that he did not admit the execution and validity of the will that it was a spirious document brought about by the exercise of undue influence that so far as he knew the testator never put his signature to the will and he ended by saying that if the Court considered the will genuine and was prepared to grant probate he was willing to act as executor held that this did not amount to a renunciation and the executor was entitled to probate—Venketamers \( \) Govindarapalier and the executor was entitled to probate—Venketamers \( \) Govindarapalier (supra) \( Saidabala \) \( \) \( Baidya Nath \) \( 32 \) CW N \( 729 \) (730) \( \) ATR \( 1928 \) Cal 580 \( 101 \) C 542.

Withdrawal of renunciation — A renunciation is not effectual until it has been recorded and filed and until it has been recorded it can be withdrawn—In the goods of Morant LR 3 P & D 151 In the goods of Morant LR 35 Cal 156 That is a mere intention to renounce is not the same thing as actual renunciation and until there is actual renunciation the intention to renounce may be withdrawn—In the goods of Manick Lal 35 Cal 156 If there is actual renunciation made by a statem—in the Court it cannot be withdrawn—Raghbar & Gadodus 110 IC 506 AIR 1928 Lah 470 (472) Gadodia v Raghubar AIR 1931 Lah 746 (748)

A fortion a renuncation cannot be withdrawn after probate has been granted to a co-executor. Thus where on an application by one of several executors for probate, notice was issued to the others, and one among these

persons renounced his executorship and contested the will but later on after the crant of probate to the applicant applied for withdrawing the renunciation and for being appointed executor held that he was too late as the grant had already been made-Han Ram v Ram Singh 27 CWN 285 AIR 1923 Cal 444 75 IC 218

Where the renunciation was made by the executor by reason of consultation with the executor's legal advisers and all parties concerned for the benefit of the estate and by reason of this renunciation the other side also withdrew her application for letters of administration and then a fresh petition for probate was filed by the executor 9 years after the matter had been amicably settled and it appeared that a grant of probate would now create doubts about the rights of other per one dealing with the estate it was held that it was not a fit case in which the executor should be permitted to retract his renunciation and apply for probate-Brojo Lal v Sharajubala 51 Cal 745 (760) AIR 1924 Cal 864 84 I C 154

Renunciation by administrator -Although secs 229 231 (which deal with the subject of renunciation) are applicable only in the case of an executor and there is no corresponding provision in this Act with regard to an administrator still there is no reason why the principle of these suctions should not apply to an administrator. In English law and practice as regards the right of renun ciation there is no distinction made between the case of an executor and that of an administrator and the same rule should apply in India. As regards withdrawal of renunciation the rule is that a renunciation by an administrator cannot be withdrawn without the leave of the Court and he can be allowed to withdraw only in a fit and proper case and not merely on the ground that he has changed his mind-In to Manchersa 53 Bom 172 30 Bom LR 1566 113 I C 402 A I R 1929 Bom 33 (34 35)

If an executor renounces, or fails to accept an Section 18 executorship within the time limited Act Vof for the acceptance or refusal thereof, Section 195 Procedure weher exe the will may be proved and letters of Act of

cutor renounces or fails to accept within time limited

administration with a copy of the will annexed may be granted to the person who would be entitled to administration in case of intestacy

256 An executrix in answer to a citation under section 16 (now section 229) calling upon her to accept or renounce her executorship stated that she was already acting as executrix and administering the estate and that she did not consider necessary at that stage to take out probate as she had applied for a succession certificate Held that this was not such an acceptance as was contemplated by this section and that on the executrix declining to prove the will the District Judge was right in granting letters of administration with the will annexed to the sole residuary legatee-Motibas v Karsandas 19 Born 123

If the legatee is a young woman who has recently been married and has received the whole of her legacy under the will (and consequently cannot be exp cted to take any interest in her father's estate) would not be a suitable person to be granted letters of administration under this section-Granamani v Esunadian AIR 1928 Mad 797 (798), 110 IC 439

legatees.

Section 19 Act V of 1881 Section 196 Act X of 1865 Grant of administration to universal or residuary 232 When-

(a) the deceased has made a will, but has not ap pointed an executor, or

(b) the deceased has appointed an executor who is legally incapable or refuses to act, or who has died before the testator or before he has proved the will, or

(c) the executor dies after having proved the will, but before he has administered all the estate of the deceased.

an universal or a residuary legatee may be admitted to prove the will, and letters of administration with the will annexed may be granted to him of the whole estate, or of so much thereof as may be unadministered

256A Probate Court, if can construe Will to see whether applicant entitled to letters —The probate Court is entitled to construe a will in order to see whether the applicant for letters of administration is entitled to letters as a universal or a residuary legatee—Sudin Chanda v Uttari Sundari 37 C WN 455 Bhupbat Chanan v Chanda Chanan 30 C WN 300 After the Court has admitted a document to probate the construction and interpretation of its contents are left to the Chancery Division—But where the question as to who is entitled to a grant of probate or of administration (with Will) depends on the construction of a will the Probate Division may and should construe it to that extent —Tristan and Coete's Probate Practice 17th Edn at p 432.

257 Grant of administration to universal or residuary legates —Before letters of administration with the will annexed may be granted to a residuary legatee there must be strict proof of the execution of the will—Kuppayammal v Ammani 22 Mad 345 (340) Where executors have been appointed by a will a legatee cannot be allowed to administer the estate of the testator unless all the executors refuse to act. But the Court should not consider whether the executors who are willing to act are fit and proper persons for the grant of probate—Kamman v Massit 24 Pt. R 1912 13 I C 171 (172).

In all cases where no executor is appointed or where the appointed extentor fails to represent the testator the residuary legates if there be one is preferred to the next of I want and entitled to letters of administration—Thomas v Butler 1 Ventr 219. The residuary legates is the testator's choice he is the next person in his election to the executor. He is entitled to administration in preference to other legates and annuitants—Althuson v Barnard 2 Phillim 316. If there are several persons entitled to the residue administration may be granted to any of them without notice to or consent of the others—Taylor v Shore T Jones 162.

If an executor or administrator dies without having administered the estate the duty of earrying on the administration of the estate will not devolve upon the deceased executors or administrators personal representative but upon a person appointed under this section. The administrator of an executor is not a derivative executor—Ramanathan v Ragammal 17 MLT 61 27 IC 849 (857) Similarly the executor of an executor is not the definative executor.

the original testator—Nathu Ram v Alliance Bank 30 PLR 325 A1R 1929 Lah. 516 (547) 116 1C 558 De Souza v Secretary of State 12 BLR 423 So where an executor dies before fully administering the estate then as between the risiduary legatee and the executor of the deceased executor the former is the preferential claimant for letters of administration—De Souza v Secretary of State 12 BLR 423

If the executor died during the pendency of the probate proceedings before obtaining the probate his widow (legal representative) could not be substituted in his place as the right of the executor did not survive to his legal representative—Sarat Chantra v Nani Moham 36 Cal 799 (800) She can claim letters of administration by her own right but not as representing her deceased husband—Ibid

The universal legatee is entitled to letters of administration with the will annexed and not to probate—In the goods of Saskee Bhushan 19 Cal 582 (dissenting from 7 BLR 563) Mehar Chand v Lachhmi 73 PLR 1908 A probate granted to a univer al legatee by mistake is invalid from the first and the person to whom such grant was made cannot be constituted an executor so as to be empowered to exercise any of the powers conferred on an executor under the Act—Paragu y Goukaran 6 C WN 787 (790 791)

A residuary legatee cannot establish his claim under sec 213 until he has obtained a grant of letters of administration with the will annexed under this section—Gordhandas v Bas Rameover 28 Bom 267 (270)

Where the universal or residuary legatee is a minor administration cannot be granted to him (sec 236) but his guardian (eg mother) may be appointed administrator during his minority—Janks Accr v Mansakian 56 I C 841 (Pat.) See sec 244 Cf Lada Rami v Subhag Rami 28 P L R 220 A I R 1927 Lah 770

Where a Hindu testatrix by her will directed the payment of Rs 50 to the priest of the family idol and the residue was bequeathed to the idol held that the residuary legistee was not the priest but the idol (represented by the shebatt) consequently the shebatt and not the priest was the proper person to apply for letters of administration—Kali Arishna v 4fakhon Lol 50 Cal 233 (237) 27 C WN 411 ATR 1923 Cal 160 72 IC 686

The grant of letters of administration to the universal legates is a matter of discretion of the District Judge and the High Court will not interfere with the discretion exercised by the District Judge unless it is satisfied that discretion has been unreasonably exercised—Kamila Prosad v Murit 7 PLT 631 94 IC 750 AIR 1926 Pat 356 (357)

Where administration is granted in the event mentioned in clause (c) it is called administration de boms non See Section 258

257A Whole estate —An application for grant of letters of administration under sec 232 should be of the whole estate A petitioner has no right to apply for the administration of a part only or of just so much of the property as suits his purpose—Aubchard v. Mottlbar 30 SLR 201 AIR 1936 Sind 150 165 1C 202

So much thereof as may be unadministered —The words so much thereof as may be unadministered apply only to d (c) of the section and not to the preceding cls. (a) and (b) and administration under the section means administration under the authority of a Court—Aubchand v Motilbai 30 SLR. 201 AIR 1936 Sand [50 ] Go IC 202

legatee

Section 20 Act V of 1881 Section 197 Act \ of 1865 Right to administra tion of representative of deceased residuary

When a residually legatee who has a beneficial interest survives the testator, but dies before the estate has been fully admi instered, his representative has the same right to administration with the

will annexed as such residuary legatee

258 Representative's right to administration—Where the residuary legatee survives the testator and has a beneficial interest his representative has the same right to administration as the residuary legatee himself and is therefore entitled to administration in preference to the next of kin of the testator or to other legatees—Wetdrill v Wright 2 Phillim 243 Re Thinwall 6 Notes of Cas 44 But where the residuary legatee is a mere trustee without any beneficial interest it is the ordinary rule of practice in the absence of special circumstances upon his death to grant the administration not to his representative but to such person or persons as have the beneficial interest in the readuary estate—Hutchmson v Lambert 3 Add 27 Coussmoker v Chamberlayne 2 Cas temp Lee 243

Where a residuary legatee applied for letters of administration with a copy of the will appreced but died before he obtained them and his heir applied to be substituted in his father's pla e it was held by the Calcutta High Court that the right to a grant of administration was a personal right derived from the Court which could not survive to the present applicant and that he could not claim to be substituted in his father's place but that he might apply for a grant of administration on the ground that as he was the heir of his father to the residuary legacy he was the person most interested in the estate and was now the person primarily entitled to the grant-Hari Bhusan v Manmatha 45 Cal 862 (865) 51 IC 76 But the correctness of this ruling has been doubted by the Patna High Court which observes that if the heir of the resi duary legatee is a person primarily entitled to obtain letters of administration there is no reason why he should be debarred from carrying on the proceedings which were started by his father who had died before the letters could be granted A distinction has been drawn by the Legislature between the position of an executor and that of an administrator under sec 222 probate can be granted only to an executor appointed by the will and by no means to an heir of the executor but the provision as to persons who are entitled to letters of adminis tration is not so struggent. If the heir of the residuary or sole legatee is ad mittedly a competent person to obtain letters of administration then if the sole legatee has died during the pendency of an appeal against an order refusing to grant him administration on the ground that the will has not been proved to be genuine his heir ought to be substituted in his place for the purpose of carrying on the appeal and obtaining a final adjudication as to whether the will is centine or not -Phekm v Manks 9 Pat 698 AIR 1930 Pat 618 (620 621) 128 I C 128

Where a residuary legatee who was appointed executor died after obtaining probate but before the estate was fully administered his son was entitled to obtain letters of administration with the will annexed under this section—In re Many Jetha 34 Bom L.R. 606. A.I.R. 1932 Bom. 270 (271) 138 I.C. 712

The word representative is not restricted to a legal representative and therefore the hear of the executor applying to the Original Side of the High Court Bombay under this section is not required to obtain representation

according to the procedure followed in the office of the Testamentary Registrar regarding a legal representative -In te Manji Jetha supra

Grant of administra tion where no executor nor residuary legatee nor representative of such

234 When there is no executor and no residuary Section 21 legatee or representative of a residuary Act V of legater, or he declines or is incapable Section 198 to act, or cannot be found, the person Act X of or persons who would be entitled to

legatee the administration of the estate of the deceased if he had died intestate, or any other legatee having a beneficial interest, or a creditor, may be admitted to prove the will, and letters of administration may be granted to him or them accordingly

Scope -This section applies only to cases where no executor has been appointed or where if an executor has been appointed he declines to act. It cannot apply where an executor has been appointed. The fact that the executor is a minor is not tantamount to saying that the executor declines to act within the meaning of this section. It is not a case of declining to act but of inability to act and the case of such minor executor is specially provided in sec 244-Viraming v Seshamma 54 Mad 266 AIR 1931 Mad 343 (344) 132 IC 127

If the residuary legatee declines it is usual to grant administration cum icstamento annexo to the next of kin-Williams 11th Edn p 381 If the executor fails to take out probate and there is no residuary legatee the next of kin are entitled to administration with a copy of the will annexed-Kooystra v Buyskes 3 Phillim 531 Where there was no executor nor residuary legatee administration with the will annexed was granted to the legatees in the will-Re Hinchles 1 Hagg 477 Where a sole executrix and universal legatee had not been heard of for forty years the Court granted administration with the will annexed to the representative of the next of kin of the testatrix-In the goods of Ley [1892] P 6 If the next of kin declines it the administration may be granted to a creditor-Kooystra v Buyskes (supra) Snape v Webb 2 Cas. temp Lee 411

Where the position taken up by the applicant was that the will was a forgery and that the ladies through whom he claimed were in possession not by virtue of the will but adversely to the whole estate and had acquired a title to the estate by affirerse possession held that the applicant was incapable to act in the discharge of his duties as administrator-Langla I rasad v Murli 7 PI. T 631 94 IC 750 AIR 1926 Pat 356 (357)

The term residuary legatee in this section does not include universal legatee -- Ibid

Sole beneficiaries, if residuary legateer, though not named as such -Persons who are the sole beneficiaries under a will at the date of the application for letters of administration may be regarded as residuary legatees for the purposes of sec 234 though they may not have been named as residuary legatees-Durgapada v Atul Chandra 41 CWN 1204

Proof of Execution -In an application for the grant of letters of administration with a copy of the will annexed the mere fact that in the pleas taken by an objector there is no categorical denial of the execution of the will by the alleged testator is no sufficient ground for dispensing with the formal proof of the will as required by law—Tulsan v Payre Lal 38 PLR 930 164 IC 778

259A Question whether estate already fully administered, if relevant -In cases of testamentary succession where there is a will and it has never been probated the question whether the estate has or has not been already fully administered is not relevant and cannot be gone into by the Court in dealing with an application for probate or letters of administration. In the case of Durgapada Bera v Atul Chandra Bera (41 CWN 1204) it was con tended that as the estate had been fully administered no grant should be made because that would be merely lending assistance by the Court to a futile proceed ing (Lalit Chandra v Baskuntha Nath 14 CWN 463 In the goods of Nursing Chunder Bysack 3 CWN 635 Lakshmi Natain v Nanda Rani 9 CL J 116 Prosonno Kuman v Ram Chandra 17 CLJ 66) Their Lordships (Henderson and Biswas JJ ) observed in the judgment But none of these cases is in point Here we have got to deal with a ca e where a person left a will the question is whether probate or letters of administration with the will annexed ought to be granted In some of the cases to which I have just referred there were no wills and the question was whether a person was entitled to a grant as a matter of right even though it was found that the estate had been fully administered as on intestacy. The learned Judges very rightly pointed out that in such a case it was the duty of the Court in granting letters of administration to consider whether there was any estate left to administer. In some of the other cases probate or letters of administration with a copy of the will annexed had already been granted and then years after applications were made on behalf of the executor or the administrator for permission to alienate part of the estate under sec 90 of the Probate and Administration Act V of 1881. In dealing with such applications the Court went into the question as to whether or not there was any estate still left to administer and where it was found that there was none the permission was refused. An effective answer to Mr. Bose's argument is furnished by the decision of this Court in the case of Adwart Ch. Mondal v Krishna Dhone Sarlar (21 CWN 1129) to which I drew his attention during argument. That was a case exactly in point except that instead of being an application for letters of administration with the will annexed the application was for probate. This however would not make any difference in principle. In this case the application was opposed on the ground that the will was not genuing and a condly that there was no estate left to be administered the second point it was contended on the authority of the case of Lalit Chandra Choudhury v Baskuntha Nath Choudhury (14 CWN 463) and the other cases some of which I have already mentioned in that connection that no letters of administration ought to be granted. Mr. Justice Chatteriee pointed out very rightly if I may say so with respect that the cases of In the goods of Nursing Chunder Bysack (3 CW N 635) and Laht Chandra Choudhury v Barkuntha Nath Choudhury (14 CWN 463) related to applications for letters of adminis tration in case of intestate succession and said that in such a case it was the duty of the Court in granting letters of administration to consider whether the estate had or had not been fully administered.

No Limitation —Applications for probate or letters of administration with the will annexed (as well as applications for revocation of probate or of letters of administration) are not governed by the law of limitation. Long delay in making an application for probate or for letters of administration with the will annexed is no doubt a circumstance which may be properly taken into account in determining the question of the grammeness of the will but that is about the

only purpose for which it is relevant in such a proceeding. Cases are not unknown in the reported decisions where probate or letters of administration have been granted many years after the death of the testator—In the matter of the petition of Ishan Chunder Roy 6 Cal 707 Khagessar v Somesuar 33 CLJ 382, Durgapada v, Atti Chandra 41 CWN 1204

235 Letters of administration with the will annexed Section 2 shall not be granted to any legatee Act V of 1881

Citation before grant of administration to legatee other than uni versal or residuary shall not be granted to any legatee Act Vo other than an universal or a residuary Section I legatee, until a citation has been issued Act Vo and published in the manner herein-

after mentioned, calling on the next of-kin to accept or refuse letters of administration

260 The principle is that where a party has a prior title to a grant he must be cited before administration is committed to any other person (In the goods of Barker 1 Curt 592) Therefore the evecutor if there be one must be cited before a grant to a residuary legatee (see sec 229 ante) a residuary legatee before a grant to a specific legatee and so on through all the graduous of priority. So if there is a testamentary disposition without an executor the party in whose favour the disposition is made must cite the next of kin before he can have administration cum testamento annexo—Williams 11th Edn p 382.

This section is intended to protect the possible right of the next of kin to the administration of the estate where no executor has been appointed and where the application is made by a specific legatee ie by a legatee other than an universal or a residuary legatee. But even in the case of an application by an universal or a residuary legatee this section does not relieve him from the obligation to call upon the reversioners and to give them an opportunity of protecting their vested interests in the reversion—Priya Nath v Sailabala AIR 1292 Pat 385 (387)

To whom administration cannot be granted to Section 13 any person who is a minor or is of 1881 tration may not be unsound mind nor to any association of Section 18 individuals unit.ss it is a company which 1885

satisfies the conditions prescribed by rules to be made by the Provincial Government in this behalf

Changes —The words nor unless the deceased was a Hindu Muham madan Buddhist Sikh or Jaina or an exempted person to a married woman without the previous consent of her husband which occurred after the word mind have been omitted by the Indian Succession Amendment Act, XVIII of 1927 A similar amendment has been made in sec 223 Probate or Letters of Administration can now be granted to a Christian married woman without the consent of her husband For Statement of Objects and Reasons see Notes under sec 223

The words nor to any Governor General in Council in this behalf — were added by Act VVII of 1931. The words. Provincial Government have been substituted for Governor General in Council by the Government of India (Adaptation of Indian Laws) Order, 1937.

261 Minor — See In re-Sucrosson 21 Cal 911 cited at p. 5 ante. A grant of letters of idenoistration to a rinner is a multity and will be set ande—
Fila latertite v. Teban to PT F. 581 VTR. 1925 1 at 323 86 IC 52. Ma Nyi.
v. lum, Mya. 12 Bur L.T. 27. 50 IC. 321, Ma Shan v. Ma Chit. 10 Bur L.T. 181 1 IL I. 183 v. e. luo 56 IC. 811 cited under vec. 222

#### CHAPIER II

#### OLLIMITED GRANTS

Grant's limited in divation

Section 208 Act \ of 1865 Section 24 Act V of 1881 Probate of copy or draft of lost will

Probate of copy or draft of lost will

Probate of copy or technique or recedent and not by any act of the testator, and a copy or the

draft of the will has been preserved, probate may be granted of such copy or draft limited until the original or a properly authenticated copy of it is produced

Probate of lost Will -If it is shown that a will was in the possession of the testator till the time of his death but was not found after his death the question arises can the loss be referred to the presumption of revocation by the testator himself? It has been said that such a question is to be decided more or less upon the circumstances of each case. It cannot be laid down as a rule of law that under such and such circumstances a presumption should be made that the will was revoked by the testator. Under this section it must be proved that the will was in existence after the testator's death and has been lost or mislaid since his death. Where at the time of execution of the will the testator had no son but a son was born to him after the will and there was no proof that the will was in existence at the time of his death and it was lost or mislaid after that event the presumption was that the will must have been revoked by the testator and probate was refused-Efan v Podar 55 Cal 482 110 IC 283 AIR 1928 Cal 307 (309) Where a will had been duly and validly executed but it was not forthcoming after the testator's death and the circumstances were such as not to raise any presumption of revocation but rather to show that the will might have been mislaid by the person interested in destroying the will it may be proved by means of a certified copy and under this section on the strength of the copy letters of administration may be granted limited until the original will is produced-Annar Hossein v Secretary of State 31 Cal 885 (894) 8 C W N 821

On an application for probate of a copy or draft of a will lost since the death of the testator the executor must prove (s) the due execution of the original will (n) that it had been in existence since the testator's death and has be n lost and (in) that the copy is a true one—Trist & Coole 13th Edn 117. Where a will has been lost and evidence of its contents is supplied by the production of a draft and of the parol testimony of persons who had read the will the parol estedence may be placed side by sole with the draft, and out

of them the Court will extract the contents of the will to be proved—Burls v. Burls LR 1 P & D 472

The words since the testator's death qualify only the verb mislaid and have no reference to lost. Probate will be granted under this section whether the will is lost before or after the testator's death. It is not necessary under this section to prove that the will was in existence up to the time of the testator's deuth—Sarat Chaudia's Golap Sundari 18 CWN 527 21 IC 121. But see 55 Cal 482 above

238 When a will has been lost or destroyed and no Section 209
Probate of contents of contents of copy has been minde nor the diaft preless entry of probate may be granted of its Section 25
Act V of 1881

263 Contents of lost will may be proved by secondary evidence—The contents or substance of a testamentary instrument may be established though the instrument used cannot be produced upon satisfactory proof being given that the instrument was duly made by the testator and was not revoked by him. Thus if a will duly executed is destroyed in the life time of the testator without his knowledge it may be pronounced for upon satisfactory proof of its having been so destroyed and also of its contents—Treedjan v Treedjan 1 Phillim 149. The contents of a lost will like those of any other lost instrument may be proved by secondary evidence and the Court will grant probate of the will so proved—Sugden v Lord St Leonards 1 PD 154. The contents of a lost will may be proved by the evidence of a single witness though interested whose veracity and competency are unimpeached—Total.

This is an enabling section. There is nothing in it to prevent a Court from following the ruling of the Courts of England as to grant of probate of a part of the will. Following the principles of English flaw it may be said that where the contents of a lost will are not completely proved probate can be granted to the extent to which they are proved—Acdar Nath v Sarojum 26 Cal 634 3 CWN 617.

Probate of copy where organial exists.

Probate organial e

up, but a copy has been transmitted to the executor, and it is necessary for the interests of the estate that probate should be granted without waiting for the arrival of the original, probate may be granted of the copy so transmitted, limited until the will or an authenticated copy of it is produced

Administration until but there is reason to believe that there 1865 is a will in existence, letters of admi-Section 211 the will or an authenticated copy of it is produced.

264 Where a will proved to have been in existence after the testators death is accidentally lost and the contents unknown the Court may grant letters of administration limited until the original will be found—In the goods of Campbell 2 Harg 555 In the goods of Wright (1893) P 21

Grants for the use and benefit of others having right

Section 212 Act & of 1865 Section 28 Act V of 1881 241 When any executor is absent from the province

Administration with in which application is made, and there will annexed to attorney is no executor within the province willing to act, letters of administration, with the will annexed, may be granted to the attorney or agents of the absent executor, for the use and benefit of his principal limited until he shall obtain probate or letters of

265 Attorney or agent — Section 212 of the Act of 1865 uses the word attorney section 28 of the Act of 1881 uses the word agent Both words are used in the consolidated Bill — Notes on Clauses The same remarks apply to sections 242 243 248 and 249

administration granted to himself

As the Presidency of Bengal does not include the Punjab the High Court of Calcutta was held to have no power to grant letters of administration to the attorney of the executor of a deceased person in respect of assets situate in the Punjab—In the goods of Duncan 1 BLR OC 3 But it has authority to grant letters of administration re such assets to the Administrator General—Ib d

A British subject died in England possessed of property in England and in India leaving a will of which he appointed 4 persons as his executors in England and W D his executor in India W D renounced probate Held that the attorney of his English executors was entitled to apply in India for letters of administration and the English executors were intended by the testator to have power of administering his assets in India as well as in England—In the goods of Lecther 15 B LR App 8

Both under this section and sec 242 it is necessary that the attorney applying for letters of administration should be within the jurisdiction of the Courte—In the goods of Nesbutt 4 BLR App 49

But where the application is made to  $\bar{a}$  High Court it has been stated that since the grants by High Court have operation throughout India it is sufficient if the attorney resides at the time in some place in British India though outside the jurisdiction of the High Court—In the goods of Cautley 28 PR 1883

In an application under this section by a person holding a power of attorney from the executor it is not necessary to prove by affidavit or otherwise the identity of the person executing the power of attorney with the person named as executor in the will. If the power of attorney has been executed before and authenticated by a Notary Public the authentication of the Notary is to be treated as equivalent to an affidavit of the identity of the executant—In the goods of  $M_{sinc}$  32 Cal 628 (628)

The administration granted to the attorney ceases and expires on the return of the executor—In the goods of Cassidy 4 Hagg 360 So also the letters of administration cease to be of any force on the death of the executor—Webb v Airby 7 De G M & G 376

Administration with will annexed to attorney of absent person who if present would be en titled to administer

When any person to whom, if present, letters of Section 213 administration, with the will annexed, 1865 might be granted, is absent from the Section 29 province, letters of administration, with 1881 the will annexed, may be granted to his attorney or agent, limited as mentioned in section 241

Administration to at torney of absent person entitled to administer in case of intestacy

When a person entitled to administration in case Section 214 of intestacy is absent from the pro- Act X of vince, and no person equally entitled Section 30 is willing to act, letters of administra- Act V of tion may be granted to the attorney or agent of the absent person, limited as mentioned in section

241266 If a sharer in the estate is present in the province and is willing to act a limited grant of letters should not be made under this section to the attorney of the absent sharer in the estate-Esoof Ebrahim v Esoof Sulaiman 8 Bur L T 103 26 I C 743

When a minor is sole executor or sole residuary Section 215 legatee, letters of administration, with Act X of Administration during the will annexed, may be granted to the Section 31 minority of sole executor or residuary legatee. legal guardian of such minor or to such Act V of other person as the Court may think fit until the minor has

attained his majority, at which period, and not before, probate of the will shall be granted to him

In view of the wider scope of the Bill the language of section 31 of Act V of 1881 has been followed se the words has attained his majority have been substituted for the words shall have completed the age of 18 years -Notes on Clauses

This section is in consonance with the English faw which lavs down that if an infant be appointed sole executor he is altogether disqualified from exercising his office during his minority and administration cum testamento annexo shall be granted to the guardian of such infant or to such other person as the Court shall think fit until such infant shall have attained the are of majority This sort of administration is called administration durante minore aetate

If the minor is the sole executor or the sole residuary legatee administra tion cannot be granted to him (sec 236) but his guardian may be appointed administrator during his minority See Lado Rans v Sibhag Rans 28 PLR 220 AIR 1927 Lah 770 102 IC 194 Bhag Mal v Malik AIR 1931 Lah 229 (231) 131 I C 339

It should be noted that the guardian may be granted letters of administration with will annuxed but not probate-Bhag Mal v Malik supra

If there are several executors and one of them is of full age no administra tion of this kind ought to be granted because he who is of full age may act as executor-Pigot and Gascoingn's case Brownl 46 Foxuist v Tremaine 1 Mod

47 (per Funsden J) So also if the minor is not the sole residuary legate letters cannot be granted to his guardian—Bhagaeat v Bahurta 5 PLJ 347 1 PLT 30 5 57 IC 583 Ma Saw v Ma Thit 6 LB R 118 IS IC 187

Where the guardian is an unfit person it is in the discretion of the Court to grant administration to such other person as it thinks fit. Thus where the guardian who was the grandfather of the numor was very old administration was granted to an uncle he giving full justifying security—In the goods of Euring 1 Plag 381. So also administration was not granted to a person who was very poor though he was the guardian and next of kin of the infant—Ha cris Mearts Barnard Ch C 23

An administrator durante minore actate has all the powers of an ordinary general administrator. The limit to his administration is no doubt the minority of the person but there is no other limit. He is an ordinary administrator he is appointed for the very purpose of getting in the estate paying the dcbts and selling the estate in the usual way and the property vests in him—per lessel MR in  $Re\ Cope\ 16\ Ch\ D\ 49\ 52$ 

Where probate was granted limited during the minority of the legatee who as given a life estate but vince then considerable time (14 years) has elapsed during which the legatee has died the executor is functus officio and if he still retains possession of the estate he is in the position of a trustee—Nand Aishore V Pashupati 7 Pat 396 108 IC 323 AIR 1928 Pat 348 (349). The proper remedy of the present heir of the testator is to file a suit in the Civil Court for the administration of the estate—bad.

Section 216 Act X of 1865 Section 32 Act V of 1881

Administration during minority of several exe cutors or residuary lega

When there are two of more minor executors and no executor who has attained majority, or two or more residuary legatees and no residuary legatee who has attained majority, the grant shall be

limited until one of them shall have attained his majority

245

The wording of section 32 of Act V of 1881 has been followed as it covers both cases —Report of the Committee

288 If administration be granted during the minority of several infants it determines upon the coming of age of any one of them. Thus if there be several infant executors he who first attains the age of majority shall prove the will and may execute it—Wilhams 11th Edn. Vol 1 p. 398. So also if one of the several infants dues before he comes of a e this does not put an end to the administration—finonymous Brown 17 Jones v Strafford 3 P. Wins 89.

Section 217 Act X of 1865 Section 33 Act V of 1881

Administration for use and benefit of lunatic or minor

246

If a sole executor or a sole universal or residuary on for use kg itee or a person who would be solely lumate or chitled to the estate of the intestate according to the rule for the distribution s estates applicable in the case of the deceased, a lumate kitters of adjunction with

of intestrites estrites applicable in the case of the deceased, is a minor or lumite letters of administration with or with out the will annexed as the case may be, shall be granted to the person to whom the care of his estate has been com-

mitted by competent authority, or, if there is no such person, to such other person as the Court may think fit to appoint, for the use and benefit of the immor or lunatic until he attains majority or becomes of sound mind, as the case may be

Section 217 of the Act of 1865 does not deal with the case of minors section 33 of the Act of 1881 does. As it appears to be merely casus omissus and the provision is in accordance with actual practice the language of section 33 of the Act of 1881 has been adopted —Notes on Clauses

269 If the person appointed sole executor or he to whom in case of intestacy the right to administration has devolved under the statutes be within age administration must be granted durante minore actate—Williams (11th Edn) p 392

So also if the executor be disabled from acting as when he becomes lunation or incapable of legal acts then on the principle of necessity there shall be a grant of a temporary administration with the will annexed—Hills v Mills 1 Salk 36 Where a sole executor or administrator becomes a lunatic it is the ordinary practice of the Court to make a limited grant to his Committee, for his use and benefit during his lunacy—In the goods of Phillips 2 Add 336 (note) In the goods of Cooke [1895] P 69 Where one of three executors who had proved the will subsequently became of unsound mind the Court on the application of others revoked the grant and made a fresh grant of probate to the applicants reserving power to the lunatic in case he should become of sound mind and anoly to now in the probate—In the estate of Shaw [1905] P 92

It will be noticed that while this Act makes special provisions for a minor or lunatic there is nothing in the statute that takes away administration from a disqualified proprietor (provided the disqualified proprietor is not a minor or lunatic) and gives it to the manager of the Court of Wards. The manager has large powers of management over the estate of the proprietor but there is nothing in the Act that entitles him as such manager and by virtue of his office to apply for letters of administration to the estate of the deceased in which the disqualified proprietor may have a large interest. But the Court is entitled to grant administration to the manager of the Court of Wards as a person coming within the description of such person within the meaning of section 254—Bhaguati v Bahuria Ramsakhi 5 PLR 347 1 PLT 304 57 IC 583 (586 587)

If the executor is a linatic an administrator is appointed until he (executor) becomes of sound mind. And therefore if the lunatic executor recovers his sanity he should be granted probate of the will—Bonny v. Edwards. 12 O.C. 390.4 I.C. 781 (784)

An administrator appointed under this section possesses all the powers conferred by this Act on an ordinary administrator (see Notes under sec. 314) so creditors dealing with an administrator appointed under this section are in the same position as persons advancing money to an ordinary administrator appointed under some other section of the Act—Bonny v Eduards 12 OC 390 4 IC 781 (785)

Before a grant can be made under this section it must be shown that the minors for whose benefit the grant is to be sought are solely entitled to the estate of the deceased If there are other persons entitled to the estate jointly with the minors an application under this section is not maintainable— In re 1 eshi antibas 31 Bom.L.R 999 ATR 1929 Bom 397 (398)

270 Procedure —The guardian of the minor before he applies for the grant of letters of administration to himself for the use and benefit of the minor must jet himself duly appointed as guardian for the purpose of applying for such grant and the application for such grant is to be made in the name of the guardian when so appointed and not in the name of the minor—In the goods of Nitojini 31 Cal 706 Bhagenust v Bahuria Ramsakhi supra Viramma v Sekhamma 51 Mad 268 Al R 1931 Mad 33 (344) 132 IC 127.

The procedure to be followed under this section is this. There should be two applications one for the appointment of a proper person to represent the linatic (or manor) and another for the grant of letters. If however there is only one application size for the grant of letters the procedure is no doubt defective but it does not affect the ments of the case—Ma Chit v. Kjaw Maung A. Hr. 1933 Rang 128 (129) 144 1 C. 821.

When an application is made under this section for letters of administration for the use and benefit of a minor the Court should follow the provisions of sec. 247 for the preservation and protection of the deceased sproperty especially when such property is in jeopardy being perishable or otherwise instead of enforcing the provisions of sec. 492 C. P. Code. 1882 (O. 39 r. 1. of the Code of 1908) which has been enacted for purposes other than what sec. 247 contemplates—Madhavrao v. Maniklal. 2. Bom L. R. 797

Section 218 Act X of 1865 Section 34 Act V of 1881 247 Pending any suit touching the validity of the will of a deceased person or for obtaining or revoking any probate or any grant of letters of administration, the Court

may appoint an administrator of the estate of such deceased person, who shall have all the rights and powers of a general administrator, other than the right of distributing such estate, and every such administrator shall be subject to the immediate control of the Court and shall act under its direction

271 Before granting administration pendente lite the Court has to be satisfied in the first place that there is a bone fide suit pending touching the validity of the will of the deceased—Pandurang v. Duarkedas 35 Bom LR 700 AIR 1933 Bom 342 (343) 146 IC 621 The Court of Probate would grant administration pendente lite in all cases where necessity for the grant is made out and this is so because v. hile the out is pending there is no one legally entitled to receive or hold the assets or give discharges—Bellew V. Bellew 4 Sw. & Tr. 58 Brindaban v. Sureshiam 10 C.L. J. 263 2 IC 178 (185)

But the appointment of an administrator fendente lite does not follow as a matter of course whenever litigation is pending Before granting administration pendente lite the Court must be satisfied as to the necessity of such an administrator and the applicant is required to show for instance that it is necessary for the preservation of the estate for receiving rents interest or dividends on shares and that no fit and proper person is in a position to discharge these offices—Horrell v Butts (1886) 1 P & D 103 Buban Mohim v hiran bala 13 CLJ 47 9 IC 215 (216) Jogendar v Atundra 13 CLJ 34 2 IC (288 (639) Pandurang v Dumbadas 35 Bom LR 700 A IR 1933 Bom 342

(344) 116 IC 621 Where there is no question as to the fitness of the person who has been appointed executor by the will and who can discharge the functions of an administrator the Court should refuse to appoint an adminis trator pendente lite-Jogendra v Atmera supra Mortimer v Paull (1870) 2 P & D 85 Pandurang v Duarkadas supra It is manifest from the language used in this section that the Court has a discretion in the matter of appointing an administrator pendente lite. But the exercise of this discretion must be judicial and not arbitrary that is circumstances must be established which justify the appointment of such an administrator. It cannot be affirmed as an inflexible rule that whenever there is a suit to ching the validity of the will or for obtaining or revoking any probate or grant of administration it is obligatory upon the Court to appoint an administrator under this section-Bhuban Mohins v hiranbala supra logendra v Atindra supra The Court will appoint an ad ministrator pendente lite where various suits are pending in different Courts and the estate is of considerable value and extent for the preservation of which proper arrangement should be made-Pandurang v Dwarkadas supra Brinda ban v Sureshuar supra And the Court will appoint an administrator bendente life even though a receiver may have been appointed by the Court of Chancery in a suit pending between the same parties and affecting the same property as the testamentary or administration suit-Tichborne v Tichborne (1869) LR 1 P & D 730 The Court will appoint such an administrator in all cases where the Court of Chancery would appoint a receiver-Bellew v Bellew (1865) 4 Sw & Tr 58 (61) The position of an administrator pendente lite is similar to that of a receiver with this distinction that the administrator represents the estate for all purposes (except distribution) whereas the receiver does not repre sent the estate nor the parties but simply holds the estate for the benefit of the successful litigant-Pandurang v Dwarkadas 35 Bom LR 700 AIR. 1933 Bom 342 (343) 146 IC 621 Meer a Kuratul am v Broughton 1 CWN 336 See also Gour Mam v Baroda 44 I C 657 (Cal.)

Apart from the Indian Succession Act the Court has general jurisdiction to appoint a receiver in any case in \(\circ\) high it may appear just and convenient to do so Such an appointment cannot be claimed as of right merely because the proceedings are contested but whenever there is a bown fide dispute and a case of necessity has be in made out the Court in its discretion generally makes the grant—Pandurang \(\circ\) Duarkadas 35 Bom LR 700 AIR 1933 Bom 342 (344) 146 IC 621

The Court has power under this section to appoint an administrator in contested testamentary and administration suits on the application of a person who is not a party to the suit. Thus in an administration suit which was likely to be protracted the Court appointed an administrator pendente lite at the instance of a creditor who was not a party to the suit.—Tuchborne v. Tuch borne (supra). In the goods of Et ans. 15 PD. 215. In the estate of Cleaver [1906] P. 319.

A person who is one of the litigating parties ought not to be appointed administrator pendente lite. The Court should appoint an impartial person eg a Court receiver who is independent of and bound to be indifferent between the contesting parties—Pandurang v Duarkadas supra

The duties of the administrator pendente lite commence from the order of appointment and if the decree in the action is appealed against do not cease until the appeal has been disposed of—Taylor v Taylor 6 PD 29. Even the fact that the executors have taken possession does not take away the jundiction of the Court to appoint an administrator during the pendency of the

appeal—Pramala Bala v Joetindra 28 CWN 576 (578 579) AIR 1924 Cal 631 83 IC 597 In the absence of any appeal the functions of an administrator terminate with a decree pronounced in favour of the will and do not continue until the executors obtain probate—Wisland v Bird [1894] P 262 Radhika Mohan v K S Bonnetyce IO CWN 566 If after the termination of his appointment he continues to intermeddle with the property in the same way as he did prior to such termination he can be sued as a quasi executor de son tort—Kshitish V Radhika 35 Cal 276 (279) 12 CWN 327 50 also the mere fact that the administrator pendente lite may have been discharged from further acting as such administrator on passing the accounts in the testa mentary jurisdiction does not operate as a discharge so as to bar a suit for account brought in the general jurisdiction of the Court—Khitish Chandra v Osmond 39 Cal 587 (597) reversing 15 CWN 832

The heir at law of the testator can maintain a suit for administration against the administrator pendente lite (appointed during a contentious probate case) even though the probate proceedings have not been determined—Meerza

Kuratul am v Broughton 1 CWN 336 (338)

If an applicant for letters of administration applies to the Court for an impunction to restrain the other party from alientaing the properties the application is misconceived because the proceeding for letters of administration is not a suit and the provisions of O 39 r 1 C P Code are therefore inapplicable to such a proceeding. The proper procedure is to apply for the appointment of an administrator pendente lite under this section. When such an application has been made the Court may in any case of necessity grant a temporary injunction restraining the person in possession of the deceased a property from alienating it either in the exercise of its inherent power or under O 39 r 7 of the C P Code—Nirode Barans y Chamatkarini 19 CWN 205 (207) 27

### Grants for special purposes

Section 219 Act X of 1865 Section 35 Act V of 1881 248 If an executor is appointed for any limited purpose specified in the will, the propose specified in will be limited to that purpose, and if he should appoint an attorney administration on his behalf, the letters of administration with the will inneed shall be limited

administration with the will annexed shall be limited accordingly

272 The Court may grant a limited probate where the testator has

272 The Court may grant a limited probate where the testator has limited the executor. And it is laid down that if a man makes and appoints an executor for one particular thing only as touching such a statute or bond and no more and makes no other executor he dies intestate as to the residue of his estate and as to this spec ality only shall have an executor and must have the will proved—It illums (11th Edn.) p 295

The same will may contain the appointment of one executor for general and another for limited purpose—Lynck v. Bellow. 3 Phillim. 421

In order to decide whether the grant is limited in character or unlimited the Court mu t see the will not for the purpose of construing the will but for the purpose of finding out whether the District Judge did make a limited grant to the executor or an unlimited one. Thus, where the plaintiff was appointed to look after the testatins a runor daughter and to look after the

estate on her behalf until her death it was held that the administration did not come to an end after the death of the legatee (daughter) if at that time there was any debt due to the estate still unrealised. Realization of the debt due to the testator is a statutory power and must remain in the executor unless the will in some vay curtails that power. As that power was not curtailed by the will in this case the grant of probate vas not a limited one and the executor was entitled to maintain a suit for the recovery of the debts due to the estate of the testator even after the death of the sole legatee—Kaloo v Bibi Ramio 2 PLT 30s 60 IC 350 (351).

Administration with will amneed limited to particular purpose will on this behalf, and the section 22 authority is limited to a particular authority is limited to a particular Act V of purpose, the letters of administration 1881

with the will annexed shall be limited accordingly

Currously enough both section 36 of the Act of 1881 and section 220 of the Act of 1865 use the word attorney. It would appear a drafting slip in the Act of 1881 and the words or agent have been added —Notes on Clauses.

250 Where a person dies, leaving property of which Section 22 he was the sole or surviving trustee, or Act X of to property in which he had no beneficial interest Section 37 on his own account, and leaves no Act V of

general representative, or one who is unable or unwilling to act as such, letters of administration, limited to such property, may be granted to the beneficiary, or to some other person on his behalf

The language of section 37 of the Act of 1881 has been adopted but there is no change in the sub tance —Notes on Clauses

273 Where property is deducated to an idol the idol being the cestus que trust is a beneficiary within the meaning of this section—Ranjit Singh v Jaganiath 12 Cell 375

This section is intended to apply only to property in which the deceased person had ownership so as to constitute it a portion of his property although he held it in trust. A Mohant is not the owner of the property of the muth and on his death a person claiming to be his successor in office cannot apply for administration in the pect of the muth property—fib Lal v Jagamohan 16 CW N 788 (800 801) 16 I C 438.

A person obtaining a limited grant under this section does not by virtue of it acquire nor his he power to dispo e of any interest outside the limits of that grant. Hence where a person has conveyed to him by the husband the property which stands in the name of his deceased wife and such person obtains a limited grant to the estate of the decreased under this section he cannot by virtue of that grant convey the rights which the heirs of the deceased have in the property—De Silia v De Silia 5 Bori L.R. 781 (on appeal from 4 Bom L.R. 819)

appeal—Pramula Bala v Jostmára 28 CWN 576 (578 579) ATR 1924 Cal 631 83 IC 597 In the absence of any appeal the functions of an administrator terminate with a decree pronounced in favour of the will and do not continue until the executors obtain probate—Wielend v Bird [1894] P 262 Radhika Mohan v K S Bonnetyee IO CWN 566 If after the termination of his appointment he continues to intermeddle with the property in the same way as he did prior to such termination he can be sued as a quasi executor de son tort Kshitish v Radhika 35 Cal 276 (279) 12 CWN 327 So also the mere fact that the administrator pendente lite may have been discharged from further acting as such administrator on passing the accounts in the testa mentary jurisdiction does not operate as a discharge so as to bar a suit for account brought in the general jurisdiction of the Court—Khitish Chandra v Osmoud 39 cal 587 (597) reversing 15 CWN 832

The heir at law of the testator can maintain a suit for administration against the administrator pendente lite (appointed during a contentious probate case) even though the probate proceedings have not been determined—Meer a Kuratul ain v Brouchton 1 CW N 336 (338)

If an applicant for letters of administration applies to the Court for an injunction to restrain the other party from alienating the properties the application is misconceived because the proceeding for letters of administration is not a suit and the provisions of O 39 r 1 C P Code are therefore inapplicable to such a proceeding. The proper procedure is to apply for the appointment of an administrator pendente lite under this section. When such an application has been made the Court may in any case of necessity grant a temporary injunction restraining the person in possession of the deceased a property from alienating it either in the exercise of its inherent power or under O 39 r 7 of the C P Code—Nirode Barani v Chamatharini 19 CWN 205 (207) 27 IC 617

### Grants for special purposes

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The same will may contain the appointment of one executor for general and another for limited purpose—Lynch v Bellow 3 Phillim. 424

In order to decode whether the grant is limited in character or unlimited the Court mu t see the will not for the purpose of construing the will but for the purpose of finding out whether the District Judge did make a limited grant to the executor or an unlimited one. Thus, where the plainfulf was appointed to look after the testaturs is minor daughter and to look after the

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Administration with will annexed limited to

particular purpose

If an executor appointed generally gives an Section 220 authority to an attorney or agent to Act X of prove a will on his behalf, and the Section 36 authority is limited to a particular Act V of purpose, the letters of administration 1881

with the will annexed shall be limited accordingly

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Administration limited to property in which person has beneficial in terest.

Where a person dies, leaving property of which Section 221 he was the sole or surviving trustee, or Act X of in which he had no beneficial interest Section 37 on his own account, and leaves no Act V of general representative, or one who is

unable or unwilling to act as such, letters of administration, limited to such property, may be granted to the beneficiary, or to some other person on his behalf

The language of section 37 of the Act of 1881 has been adopted but there is no change in the substance -Notes on Clauses

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This section is intended to apply only to property in which the deceased person had ownership so as to constitute it a portion of his property although he held it in trust A Mohant is not the owner of the property of the muth and on his death a person claiming to be his successor in office cannot apply for administration in respect of the muth property-Jib Lal v Jagamohan 16 CWN 798 (800 801) 16 IC 453

A person obtaining a limited grant under this section does not by virtue of it acquire nor has he power to dispose of any interest outside the limits of that grant. Hence where a person has conveyed to him by the husband the property which stands in the name of his deceased wife and such person obtains a limited grant to the estate of the deceased under this section he cannot by virtue of that grant convey the rights which the heirs of the deceased have in the property.-De Salva , De Salva 5 Bom L.R. 784 (on appeal from 4 Bom LR 849)

to suit

If any partnership estate stands in the name of any partner the latter is a trustee of that particular estate or property for the partnership. And he cannot be said to have any beneficial interest on his own account therein because until the partnership is wound up and accounts taken no partner can be said to have any beneficial interest in any partnership estate or property nor would be be able to make any beneficial use thereof for himself-In te Adarys Manchers 55 Born 795 133 I C 845 A J R 1931 Born 428 (429)

Section 222 Act X of 1865 Section 38 Act V of

Administration limited

When it is necessary that the representative of a person deceased be made a party to a pending suit, and the executor or person entitled to administration is

unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or any other cause or suit which may be commenced in the same or in any other Court between the parties, or any other parties, touching the matters at issue in the said cause or suit, and until a final decree shall be made therein and carried into complete execution

274 An application for letters of administration under this section can be granted only by the Judge within whose jurisdiction the deceased had at the time of his death a fixed place of abode or any property-Fardunis v Navasbas 17 Bom 689

Where the grantee of a limited letters of administration is made a party to the suit the estate of the deceased is properly represented so as to enable the Court to proceed in the cause and a decree obtained against such an administrator will be binding on any future grantee of general letters of adminis tration-Fauliner v Daniel 3 Hare 199 208 Ellice v Goodson 2 Coll 4

But the estate of the deceased is not properly represented by an administrator ad litem where the relief sought for in the suit is general administration in such a case the general administrator should be made a party to the suit Thus it was held in Dowdeswell v Dowdeswell 9 Ch D 294 that although the object of the suit was to establish the title of the plaintiff as sole next of kin a general administrator of the intestate's estate was a necessary party to the suit and that the intestate was not sufficiently represented by an administrator ad litem

Section 223 Act X of 1865 Section 39 Act V of 1881

If, at the expiration of twelve months from the Administration limited to purpose of becoming party to suit to be brought against adminis-

date of any probate or letters of administration, the executor or administrator to whom the same has been granted is absent from the province within

which the Court which has granted the probate or letters of administration exercises jurisdiction the Court may grant, to any person whom it may think fit letters of administration limited to the purpose of becoming and being made a party to a suit to be brought against the executor or administrator, and carrying the decree which may be made therein into effect

275 The suit instituted by the administrator durante absentia does not fall to the ground by reason of the return of the executor but it will go on he being made a party in the usual course and then the temporary administra tor might account have his costs, and be discharged-Rainsford v Taynton 7 Ves. 466 The words at the expiration of 12 months mean at or after the expiration of that period-In the goods of Ruddy LR 2 P & D 330

In any case in which it appears necessary for Section 224

Administration limited to collection and preser vation of deceased's property

ministration

preserving the property of a deceased Act Not person, the Court within whose juris- Section 40 diction any of the property is situate Act V of may grant to any person, whom such

Court may think fit, letters of administration limited to the collection and preservation of the property of the deceased and to the giving of discharges for debts due to his estate, subject to the directions of the Court

The letters of administration granted under this section are called letters ad collegendum bona defuncts (se to collect the goods of the deceased)

Such letters may be granted to a stranger Thus where a sole next of kin refu ed to take out letters of administration the Court decreed letters of ad ministration to a person who had been her agent limited to the collection of all the personal property of the deceased and giving discharges for the debts which might have been due to the estate on the payment of the same and doing what further might be necessary for the preservation of the property and to the safe keeping of the same to abide the directions of the Court-In the goods of Radnall 2 Add 232 So allo a grant ad collegenda bong was made to a friend of the deceased who had practically no relatives hving-In re Rolland 4 CWN CXCI

Where it is for the benefit of the estate the Court will direct an administrator ad colligenda bona to dispose of the property or any portion of it by sale -In the goods of Schuerdtfeger 1 PD 424 In the goods of Roberts [1898] P 149 In the goods of Bolton [1899] P 186

If a grant of letters of administration with a copy of the will annexed has been made to the Administrator General for the limited purpose of collecting the assets and paying the debts and funeral charges an application can be made subsequently by the universal legatee who is an executor according to the tenor for the grant of probate and for resocation of the letters of administration granted to the Administrator General-In the goods of Courjon 25 Cal 65 (72)

(1) When a person has died intestate, or leaving Section 225 Act X of a will of which there is no executor 1865 Appointment as ad ministrator of person willing and competent to act or where Section 41 the executor is, at the time of the death 1881 other than one who in ordinary circumstances would be entitled to ad of such person, resident out of the pro-

vince, and it appears to the Court to be necessary or convenient to appoint some person to administer the estate or any part thereof, other than the person who, in ordinary circumstances would be entitled to a grant of administration, the Court may, in its discretion, having legald to consanguinty, amount of interest, the safety of the estate and probability that it will be properly administered, appoint such person as it thinks fit to be administrator

(2) In every such case letters of administration may be limited or not as the Court thinks fit

This section is an exception to see 218

277 Principle —Grants under this section are made for the protection and preservation of the estate of the deceased per on These are made in the exercise of the discretionary powers of the Court and not as recognising any legal interest of the grantees in the estate of the deceased person—In re Kamines money 21 Cal 697 But where there is a person who is legally entitled to letters of administration under sec 218 administration should be granted to sich person (Havnes v Matheus; 1 Sw & Tr 462) and it is not in the power of the Court to direct that somebody else who has no present interest in the estate should be associated with such person—Annapurna v Kallyami 21 Cal 164

In exercising the discretion under this section the Court is not to be guided by the wishes or feeling of the parties but is to look to the benefit of the estate and to that of all the persons interested in the distribution of the property. The first duty of the Court then is to place it in the hands of that person who is likely best to convert it to the advantage of those who have claims either in paying the creditors or in making distribution, the primary object is the interest of the property -Per Sir J Nicholl in Warwick v Greville (1809) 1 Phillim 125 Sizadas v Surendra 40 CL J 24 82 JC 382 AJR 1925 Cal The essential condition for the exercise of the Court's discretion under this section is the presence of such special circumstances in the case as render such a grant absolutely necessary and not convenient merely as being a saving of time or expense to the applicant-Bhaguati & Bahuria Ramsakhi 5 PLJ 347 1 PLT 304 57 IC 583 (587) Tristram & Coote 74 75 Another element to be taken into consideration is the consumulary of the applicant and so if per ons who are not next of hin and are not legatees come before the Court asking for the grant then the Court is entitled under this section to say that a proper case must be made out for making such a grant to persons to whom ordinarily no grant is made-Grija Bala v Manindra 31 CWN 874 (878) 103 I C 692 A I R 1927 Cal 654

Letters of administration may be granted under this section where for ought to be superseded and the grant made to another person—Annapurna v hallsom 21 Cal 164 as for instance when the Court is of opinion that the estate is likely to be wated or dissipated in the hands of the person entitled under the general provisions of the statute of the grant—Bhagwait v Bahuria (supra). Whire the nearest relatives of the deceased that is the persons who are legally entitled to a grant of administration have disqualified themselves by the proceeding, is they took under this Act in the course of which they denied the existence of the will and they did not make any claim to administer it is clear that the administration of the property cannot afely be entrusted to any

of these persons and a proper case is made out of the application of this section—Deputy Commissioner \ Tep Aishen 14 OC 14 8 IC 695 (700) The general rule is to grant administration to the person having the largest interest in the estate of the deceased and that rule ought not to be departed from except under urgent necessty for the protection and preservation of the estate. The main object of a grant being the protection and benefit of the estate the Court has a discretion to refuse the grant to a person having the largest interest if it considers that in his hands the estate will suffer irretnevable loss and damage. But the Court has no discretion to refuse the grant to a person having the largest interest in the estate merely on the ground that it would be more satisfactory to make the grant to another person—Bhaguati v Bahuria Ramisakh 5 PL J 347 I PLT 304 57 I C 583 (585)

It is in the discretion of the Court to grant letters in respect of the whole or a portion of the property. If a will makes a bequest of a specific portion (G.P. Notes and money) of his estate for a specific purpose the Court may grant letters under this section in respect of that specific portion or any further portion of the testator's estate—Defuty Commissioner v. Tet Kishen. 14. O.C. 14. 8.1.C. 695 (699)

The section is wholly inapplicable where there is no want of persons entitled to administration and it does not empower the Court to make a merely arbitrary selection from among persons contending for the grant—Bhaginais v Bahuria supra Haynes v Matheus (1859) 1 5% & Tr 462

Discretionary power of Court —The Court will decline to exercise its discretionary power under this section if the application is not a bona fide one—Narendra v Chart Chandra 12 C WN 747 T CL I 558

There is no executor willing and competent to act —The words there is no executor willing and competent to act refer to the time when the Court has to take action to appoint an administrator and not to the time of the testators death. Therefore where at the time of the testators death there was a person willing to act as executor and in fact he acted as executor for come time but afterwards renounced his office and when the Court was called upon to take act on under this section there was no executor willing and competent to act it was held that this section was applicable and the Court was competent to appoint a suitable person as administrator—Ginnamani v Esunadam 110 IC 439 AIR 1928 Mad 797 (798).

Cases -- Where a Hindu died intestate leaving five sons two of them of age and the rest minors the eldest being absent in England letters of administration were granted to the father in law of the eldest son with the consent of the second son-in re Abinash Chandra 7 CWN coxliv A claim by one of the sons of the testator is entitled to preference over that of a daughter's son-Sivadas v Surendra 40 CLJ 24 AIR. 1925 Cal 178 Where the person entitled to the administration was a resident of another country and it was not probable that he would soon return letters of administration limited until his return were granted-In re Cavendish 5 CWN cxxxvi On the death of the residuary legatee who had obtained letters of administration before fully administering the estate administration was granted under this section to an executor named in the will who had renounced-In re Makhan 3 CWN cccxxxviii A will provided The executrix will pay out of my estate into the hands of the Collector G P Notes of the value of Rs. 100000 The said Collector will realise for ever and anon the interest on these notes will establish an educational institution and pay out of the interest the monthly expenses

thereof For the purpose of building a house for the school the executor sha pay Rs 2500 into the hands of the said Collector Held that although the interest of the Collector under the will vas not a beneficial interest but merely that of a trustee the administration of the whole or any portion of the property could notwithstanding section 234 be granted to the Collector under sec 254 in view of the safety of the estate and of the probability that it will be properly administered-Deputy Commissioner , Tej Lishen 14 OC 14 8 IC 695 (700)

# Grants with exception

Section 226 Act X of 1865 Section 42 Act V of 1881

Probate or administra tion with will annexed subject to exception

255 Whenever the nature of the case requires that an exception be made, probate of a will, or letters of administration with the will annexed, shall be granted subject to such exception

Probate in respect of a postion of property -As a general rule probate should be granted in respect of the entire estate of the deceased because under sec 211 the entire estate of the testator vests in the executor appointed by the will It is only in special circumstances that a probate in respect of a portion of the property can be justified-Satpal v Collector 12 Lah 584 32 PLR 393 AIR 1931 Lah 310 (311) 135 IC 60 Probate may be granted of a portion of a will after striking out or orutting such portions of it as are proved to have been inserted without the testator's knowledge-Girish v Rasharat 1 CLJ 109 (113) In granting the probate of a will the Court can exclude therefrom such parts of the will as are not proved to have been prepared under the instructions from the testator-Hormassi v Dhangishaw 12 Bom LR 569 7 I C 657 or can exclude .uch portions as are found to have been introduced through fraud or madvertence See Note 45 under sec 61 Where any provi sion is found in a will under which the writer gets a substantial advantage and there is a ground for suspicion that the testator neither approved nor was even aware of that provision in the will probate should not be granted in respect of that portion but probate should not be refused in respect of the remainder of the will as to which there is no suspicion-Sarat Aumari v Sakhi Chand 8 Pat 382 (PC) 10 PLT 1 33 CWN 374 (380 381) 113 IC 471 AIR 1929 PC 45 The Court may exclude from the probate any offensive or libellous passages appearing in the will-In re Wartnaby 1 Rob" 423 Marsh v Marsh 1 Sw & Tr 528 536 Where unattested alterations appear in a will the Court will grant probate of the will omitting those alterations see Notes under sec. 71 Where words or clauses have been introduced into the will by accident or mistake without the knowledge of the testator the Court may admit the will to probate excepting such words or clauses-Harter v Harter LR 3 P & D 11 Morrell v Morrell LR 7 P & D 68

Section 227 Act \ of 1865 Section 43 Act V of 1881

Whenever the nature of the case requires that 256 an exception be made, letters of admi Administration with nistration shall be granted subject to exception such exception

Where the nature of the cause and the law require it the Court will grant mere administration save and except -Tristram and Coote's Probate Practice 169

If Hindus take out letters of administration they can only take out general letters of administration and not letters limited to certain property except under special circumstances—In the goods of Ram Chand 5 Cal 2 In the matter of Girish Chunder 6 Cal. 483 See notes under sec 218 But there is no provision in this Act prohibiting the grant of letters of administration for part of the property only—Gurbachan v Satuant 26 PLR 608 90 IC 620 ATR 1925 Lah 493 If the deceased has made a will as to a part of his property and 'died intestate as to the rest letters of administration should be granted to the person legally entitled except as to the property dealt with in the will—Stoney Stoney 2 Pat 508 (512) ATR 1923 Pat 348 72 IC 811 If however the executor is not legally incompetent to be the administrator of the rest of the estate no exception should be made under this section and the executor may be appointed administrator of the rest—But

### Grants of the rest

257 Whenever a grant with exception of probate, or Section 228

Probate or administra

of letters of administration with or Act Not

without the will contract the because 1865

tion of rest.

without the will annexed, has been section 44 made the person entitled to probate or Act Vof he remainder of the deceased's estate

administration of the remainder of the deceased's estate my take a grant of probate or letters of administration, as the case may be, of the rest of the deceased's estate

281 This section is the reverse of section 255 and 256 The grant under this section is called grant casterorium. When the testator has appointed an executor for a special purpose or a specific fund together with another evecutor for all other purposes and effects and the first mentioned executor has taken his limited probate the other may take probate of the rest of the testator selfects. Similarly where a limited administration has been granted of the exate of an intestate his next of kin are entitled to take administration of the rest of the deceased sestate—Tristiam & Coote 161 162. Where an executor has dealt with the (one third) properties bequeathed by the testator (a Mahomedan) and another person has subsequently obtained letters of administration the letters will be confined to those properties other than those dealt with by the executor—Manus Lee v Manus Pe 17 IC 588 (874) 5 Bur LT 255.

If the deceased has left two daughters and the c tate is very small letters of administration should be granted to one daughter in respect of the whole estate if she is not legally incompetent to administer the whose estate it is not necessary that one daughter should be granted letters of administration subject to exception in respect of her sister is share under sec 256 and the other daughter should be granted administration of the rest under sec 257. These sections should not be applied except under special circumstances—Stoney v Stoney 2 Pat 508 (512) 72 IC 811 A IR 1923 Pat 348. Different persons cannot get individual letters of administration piece meal limited to the particular property which they happen to claim. But if there has been a grant of letters under sec 255 limited to certain specific assets the only application that should be entertained is an application under sec 257 for a grant of letters overing the rest of the testator's estate—Gring Bala v Manindra 31 CWN 874 (875) 103 IC 692, A IR 1927 Cal 554.

## Grant of effects unadministered

Section 229 Act X of 1865 Section 45 Act V of 1881 Grant of administered administering such part of the estator's cstute unadministered, a new representative may be appointed for the purpose of administering such part of the estate

282 Grants under this section are called grants of administration de

In England if an executor after having proved the will of the testator but before having administered all the estate dies leaving a will and thereby appointing an executor such executor is entitled to be the executor of the original testator. But in India the executor's executor is not the derivative executor of the original testator and so a grant of administration de bonis non is necessary. See De Source v Secretary of State 12 BLR OC 423

So also the administrator of an executor is not a derivative executor of the original testator and therefore on the death of the executor the administration will not devolve on the executors administrator or personal representative but upon a person appointed under this section—Ramanatham v Ragammal 17 MLT 6 12 71 C 849 (857)

283 Cases —Where under the will of a Hindu devising property to his adopted son the estate of the testator vested in his wife who was appointed executinx therein and the executinx died without having fully administered the trusts of the will held that administration de bonis non was necessary and so where the son sued to recover the rents due to the estate neither as representing the executinx nor as the administrator de bonis non of the testator his suit failed on the ground that the estate of the testator was absolutely unrepresented—Narasimulus v Gulam Hussam 16 Mad 71 Where an executinx who was constituted shebait in respect of certain properties dedicated to an idol by the testatinx ded without appointing a successor in accordance with the power given in the will held that under this section letters of administration might be granted to the nephew of the testatinx upon his application in respect of the debuttor property as some portion of the citate of the testatinx remained to be administered on account of the non-appointment of a shebait—Ranjii Singh v Teasanath 12 cal 375

In an application for letters of administration de bonis non it is not neces some to ask for leave to dispose of the property concerned. Such power of disposal is expressly given in section 307 and it is not the practice of the Court to include in any grant of probate or letters of administration any authority to dispose of the property in respect of which the grant is made... In the goods of Mary Hemming 23 Cal 579

Under this section the letters of administration may be granted to a person to whom the original grant might have been made—Ranjit v Jagannath supra See the next section

284 'Unadministered' —No grant will be made under this section where the testators property has been fully administered. Thus where an administrating (the widow of the deceased) applied for permission to mortgage certain property left by the deceased alleging that it was necessary for the purpose of defending a suit and to repair certain houses as well as to meet certain other expenses, it was held that masmuch as there were no dobts or

legacies to be paid the administration w.s at an end and the petitioner was in possession of the properties of her deceased hisband...not as an administrativa but as widow and heiress and no such permission was necessary...In the goods of Nursing Chunder 3 CWN 635 As soon as debts legacies and funeral expense are pa d there would be no property unadministered which would pass to any administrator de boms non appointed by the Probate Court.....Gour Chandra & Monnohmi 25 CWN 332 (333) 62 IC 476

The Court will presume that the effects have been fully administered after the lapse of a sufficient period of time ( $e_g$  45 or even 20 years) from the death of the deceased—Ritchie v. Rees 1 Add 144 Chandi Charan v. Banke

Behars 10 CWN 432

259 In granting letters of administration of an Section 230 Rules as to grants of estate not fully administered, the 1865 effects unadministered Court shall be guided by the same Section 46 rules as apply to original grants, and shall grant letters of 1881 administration to those persons only to whom original grants might have been made

285 In Ranjit Singh's case 12 Cal 375 (cited under sec 258) the nephew (sister's son) of the testating was in the absence of nearer heirs entitled to the grant of administration de bonis non inasmuch as the original grant in respect of the estate might have been made to him

260 When a limited grant has expired by efflux of Section 231

Administration when limited grant expired and still some part of estate

unadministered

limited grant has expired by efflux of Section 23, time, or the happening of the event or 1865 contingency on which it was limited, Section 47 and there is still some part of the de1881 ceased's estate unadministered, letters

of administration shall be granted to those persons to whom original grants might have been made

286 When letters of administration to the deceased s estate were granted to the widow imited during the minority of her inflant son and the son died before attaining majority and before the e tate was fully administered held that letters of administration de boms non to the estate of the husband might be granted to the widow under this section and the fact of her being the heriess to her son a estate was no bar to such grant—In the goods of Griss Chandra 6 CWN S81

## CHAPTER III

# ALTERATION AND REVOCATION OF CRANTS

261 Errors in names and descriptions, or in setting Section 22 Mark errors may be forth the time and place of the de-Market limited grant, may be rectified by the Court, and the grant Lay of probate or letters of administration may be aftered and

287 The Christian name or surname of the deceased may have been mis spelt the status of the deceased mis stated or the time of the deceased death or the amount of the estate misrepre ented So in limited grants there may have been a mis description of the property to be administered or a misrecital of the power under which the will have been made or of a deed by which a trust has been created. These errors may be rectified. See Tristram and Coote 176. Thus where in a grant of probate the executor was wrongly named the Court subsequently allowed the name in the grant to be altered into the correct name—In the goods of Honeywood [1895] P. 341. So also the name of the legate in a probate was ordered to be amended in In the goods of White 4 Cal 582. In another case a clerical error in the printed form of the probate was allowed to be rectified—Grindra v. Rajesiant 27 Cal 5. If the Court refuses to amend an error under this section no appeal lies to the High Court from the order of refusal under see 239 but the High Court may deal with the case in revision—Ibid.

Section 233 Act X of 1865 Section 49 Act V of 1881

cil discovered after grant of administration with will annexed

If, after the grant of letters of administration with the will annexed, a codicil is discovered, it may be added to the grant on due proof and identification, and the grant may be altered and amended

accordingly

Procedure where cody

288 If administration (with a will annexed) has been granted and a the case of a probate but the administration with the will annexed must be revoked and a new administration taken with the will annexed must be revoked and a new administration taken with both the will and codicil annexed Tristram and Coote (16th Edn) p 241 Williams (11th Edn) p 464

Section 234 Act X of 1865 Section 50 Act V of 1881

Revocation or annul may be revoked or annulled for just ment for just cause.

The grant of probate or letters of administration

Explanation — Just cause shall be deemed to exist where e—

(a) the proceedings to obtain the grant were defective in substance, or

- (b) the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case, or
- (c) the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or madvertently, or
- (d) the grant has become useless and inoperative through circumstances, or
- (e) the person to whom the grant was made has wilfully and without reasonable cause omitted to

exhibit an inventory or account in accordance with the provisions of Chapter VII of this Part, or has exhibited under that Chapter an inventory or account which is untrue in a material respect

#### Illustrations

(1) The Court by which the grant was made had no jurisdiction

(u) The grant was made without enting parties who ought to have been cited

(iii) The will of which probate was obtained was forged or revoked (iv) A obtained letters of administration to the estate of B as his widow

but it has since transpired that she was never married to him (v) A has taken administration to the estate of B as if he had died intestate but a will has since been discovered

(11) Since probate was granted a later will has been discovered (11) Since probate was granted a codical has been discovered which revokes

or adds to the appointment of executors under the will
(1111) The person to whom probate was, or letters of administration were

granted has subsequently become of unsound mind

Whether suit lies -A grant of probate of a will cannot be con tested by a regular suit in the Civil Court It must be contested by a proceed ing in the Court out of which such grant issued and it must be contested before the Court sitting as a Court of Probate and not in the exercise of its ordinary civil jurisdiction-Narbheram v Jevallabh 35 Bom L R 998 A J R 1933 Bom 469 (474) 147 I C. 362 Sheoparshan v Ramsandan 43 Cal 694 (704) (PC) Annoda Charan v Atul 23 CWN 1045 31 CLJ 3 54 IC 197 (200) (In the molussil the District Judges are the sole Courts of Probate-In 16 Blobosoondure 6 Cal 460 (463)] When it is alleged that probate has been wrongly granted the proper course is to apply to the Court that granted it for a revocation of the same. No regular suit has to set aside the order granting probate. It would lead to the greatest confusion if the validity of the will could be questioned in a civil suit after the grant of probate. There might be any number of conflicting decisions as to the validity of the will. The executor would be exposed to endless litigation and he would never be safe in dealing with the property of the deceased-Komollochun v Niltuttun 4 Cal 360 (363) The District Judge has no power to institute proceedings on his own motion to revoke a probate under this section-Sarat Sundars v. Uma Prasad 31 Cal. 628 8 CWN 578

But a distinction should be drawn between a case in which a probate is sought to be revoked on the ground of ansalidaty of the will steelf and a case in which it is sought to be revoked on the ground of some irregularity in the proceedings in which the grant was made. The illustrations and the explanation show that just cause may be either a defect in the proceedings not necessarily affecting the validity of the will or it may be a matter which renders the will invalid. Where the case for the applicant is that the will of which probate has been obtained is intalid (eg on the ground that the will is a forgery or that the testator was incapable of making a will at the time it was made) the proper procedure is to institute a regular suit for revocation of the probate and not to make an application. If an application be made it should be treated as a plaint and the matter be set down for hearing as a suit. Where however the object is to recall the grant of a probate on the ground of some irregularity in making the grant the proceeding should be by application and not by a

sunt—In the goods of Harendra 5 CWN 383 (385) virtually dissenting from In the goods of Mahendra 5 CWN 377 (381) in which the proper procedure for revoking a grant of probate on the ground of forgery of the will was held to be an application and not a suit

What Court should consider -An applicant for revocation of a grant of probate takes upon him elf the burden of displacing the evidence which there is regarding the execution and attestation of the will. Where there is direct cogent and positive testimony of all the attesting witnesses of a will as to its execution and attestation, the Court should not instead of anniung its mind to a dispass onate consideration of that evidence start off making all kinds of speculation as to the circumstances of su picion, which make it improbable that the will could have been executed. In order to repeal the effect of such positive testimony recarding execution an improbability must be clear and cocent It must approach very nearly to if it does not altogether constitute an impossibility. If a person was takes it upon him elf to dispute the commences of a will rests his case on suspicion, the suspicion must be a suspicion inherent in the transaction itself which is challenged and cannot be a suspicion arising out of a mere conflict of testimony. This is the correct method of approach for Courts called upon to deal with testamentary cases. It can never be a safe or sound rule to start speculating as to what might have been the motive which impelled the testator to make an alleged will provided there is evidence and the Court has every right to call for such evidence and must in fact call for it-that the vill was in point of fact executed as required by law. The mere fact that a will is not registered is not such a circumstance as must then facto tell against the genuineness of the will. Where all the attesting witnesses have been examined the mere non examination of the writer by itself is not such a circumstance that one must hold from this alone that the story told by the nttesting witnesses is unworthy of credit-Kristo Gopal Nath v Baidya Nath Alan ILR (1938) 2 Cal 173

289A Review —A grant of probate or letters of administration can not only be reviewed under this section but the order granting the probate or letters may be reviewed under O 47 C P Code Section 295 Jays down that proceedings for grant of probate or letters of administration shall take the form of a regular suit the procedure of which must be regulated by the C P Code consequently an order granting probate or letters of administration may be subject to review under the C P Code—Apone Hoe v Apon Soon 3 Rang 261 91 IC 509 A IR 1925 Rang 314 (316) See also In re-Platabhar 5 Bom 638 An cx parte grant of letters of administration may be revoled by the District Judge either by taking action under this section or by way of review of the order granting the administration under sec 1514 C P Code or "under sec 1516 of the same Code—Parman v Nek Ram 37 All 280 13 A L J 441 29 1C 133

290 Jurisdiction ...The test of (local) jurisdiction in applications for grant of probate is to be applied to applications for revocation of probate is whether or not the deceased had at the time of his death his fixed place of abode or some property moveable or immoveable within the jurisdiction of the particular District Judge to whom the application for revocation is made—In te Hurio Lall 8 Cal 570

291 Who can apply for revocation—All persons who have an interest in the estate of the deceased and are entitled to enter caveat and oppose the grant of probate (under see 283) are also entitled to apply for revocation

of the probate—In re Hurro Lall 8 Cal 570 (575) In re Bhobo Soonduri 6 Cal 460 (464) In re Nilmone, 6 Cal 429 (432) Gany v Omer 13 Bur L T 111 61 I C 563 See Note 328 under see 283

But once probate in solemn form (i.e. in a contentious proceeding) has been granted no one who had been cited or taken part in those proceedings or who was cognisant of them can afterwards seek to have it cancelled-In 1e Pitambar 5 Bom 638 Persons who have appeared as caveators and have been parties to the contentious proceedings in the Court of the District Judge and also those persons who having been served with personal notice have failed to appear are bound by those proceedings but persons who were not parties to the original proceedings or though entitled to be cited were not served with personal notice thereof [see Illus (b)] can apply under this section for the revocation or annulment of the grant of probate or letters of administration-In re Bhobosoondure 6 Cal 460 (471) If a party is cognisant of the proceedings for probate or letters of administration and chooses to stand by and allows the proceedings to be concluded in his absence he will not be allowed to come in afterwards and have the grant revoked or the proceedings re opened. It is only in exceptional cases under certain circumstances and upon certain conditions that such a party will be allowed to re open the whole matter. An order for grant of probate though made upon a withdrawal of the caveat filed in the proceedings after the case was partly contested is binding on a party who is cognisant of the proceedings and chooses to stand by-In the goods of Bhuggobutty 27 Cal 927 4 CWN 757 Kunja Lal v Kailash Chandra 14 CWN 1068 (1070) 7 I C 740 Sheo Gopal v Sheo Ghulam 14 O C 77 10 I C 717 (718) An application for revocation will not be entertained if the applicant had had notice or had been aware of the previous proceedings for probate and had then abstained from coming forward-Brinda v Radhica 11 Cal 492 (494) leading English decision on the subject is the judgment of Sir John Nicholl in Newell v Weeks (1814) 2 Phill 224 and Hoffman v Norris (1805) 2 Phill 230 Equally authoritative is the judgment of Lord Penzance in Bytcherley v Andrews (1871) LR 2 P & D 327 where the following oft quoted passage If a person knowing what was passing was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result and not be allowed to re open his case

But if it be made out that the circumstances leading the petitioner to believe that the will was not genuine had not come to his knowledge till after the grant of probate the petitioner will be allowed to apply for revocation even if he were aware of the previous proceedings—Brinda v Radhica 11 Cal 492 Though the applicant for revocation of the probate was cognisant of the proceedings in which probate was granted and had assisted the planulfi in the previous proceedings yet if he did not possess any interest in the subject matter at the time of the pendency of the previous proceedings and could not have intervened therein at that stage he was entitled subsequently to apply for revocation—loung v Holloway [1895] P 87 Similarly where a probate was obtained in common form as a result of complomise between the parties it was binding on the parties to the compromise but not binding upon those who were not parties to it even though they might have been cognisiant of the probate proceedings—Kunja Lal V Radiash 14 CWN 1068 (1072) 7 1C 740 See also Notes\_under Acquiescence and Delay wifts

The fact that the petitioner for revocation of probate was acting in concert with somebody else could not take away the right which he otherwise possessed of applying for revocation—Shoreshibila v. Anadamtojee 12 C W.N 6

A presumptive reversioner to the property with which the will deals has a sufficient interest in the estate to entitle him to maintain a suit in respect of such property and he is entitled to apply for the resocation of probate-In re Hurro Lall 8 Cal 570 (573) Syama Charan v Prajulla 19 CWN 882 (881) : Bepin Behari v Manoda 6 CWN 912 Brindaban v Sureshwar 3 IC 178 (180-181) 10 CL J 263 But where a widow had already applied for revocation of letters of administration and that application had failed that decision was binding on the reversioner and the latter's application for revoca tion could not succeed except on proof that the previous proceeding had been collusive and fraudulent-Durgagate Debt v Saurabine 33 Cal. 1001 (1009) Where the immediate reversioner (daughter) has made it impossible for herself by her own conduct to maintain an application for resocation of a grant of probate the application may be made by the ultimate reversioners (daughter's sons)-Haridasi v Bidhumukhi 35 CLJ 66 AIR 1922 Cal 38 (39) Where the immediate reversioner has colluded with the propounder of the will the remote reversioner can come forward and apply for revocation of the probate-Shama Charan v Rebala 30 CWN 567 96 IC 682 AIR 1926 Cal 792

A judgment debtor who has attached the property of his debtor which property to have been inherited by such debtor from his deceased father may where the will of such deceased is set up and proved at variance with his interests apply for a revocation of the probate of the will so set up—In re Nilmonty 6 Coal 429 (431) Annullechina v Nilmitum 4 Cal 360 (cal 429 (431) Annullechina v Nilmitum 4 Cal 360 (cal 429 (431) Annullechina v Nilmitum 4 Cal 360 (cal 429 431) See also Nilmon v Umanath 10 Cal 19 (27) (PC) where their Lordships of the Judicial Committee expressed the view that an attaching creditor can apply to have the grant revoked only on the ground that the probate has been obtained in fraud of creditors.

A creditor of an hear of the deceased is entitled to apply for resocation of the probate of an alleged will of the deceased which purported to deprive the hear of a large share of the inhentance—Lakhs Narain v Multan Chand 16 CWN 1099 (1101) 15 IC 686 17 CLJ 230

A person interested by assignment in the estate of the deceased may where a vill has been et up at variance with his interests apply for revocation of probate of the will set up—Komullochun v Nihuttun 4 Cal 360 (365). And so a parchaser from the heir of a deceased person can when a will is so set up apply for revocation of the probate of the will—Muddin Mohan v Adi Charan 20 Cal 37. Lalit Mohan v Nabudunp 28 Cal 587. A transferre from the widow (who is the next heir of the deceased) may where a will has been set up in opposition to his interests apply for revoration of the probate of the will—Shekh Azim v Chandra Nath 8 C WN 748. In other words the applicant need not show that he had an interest in the estate of the deceased at the time of his death An interest acquired subsequently by purchase of a part of the estate is sufficient—Mohahadayim v Karnadhar 19 C WN 1108 (1109) 31 1 C 702. Nobim Chandra v Nibaran 59 Cal 1308 36 C W N 636 (638) 140-1C 54 A I R. 1932 Cal 734 Lindsay V Landsay (1872) 42 L J (Prob) 32

The widow of a Hindu testator though there are sons living has yet sufficient interest in the estate to entitle her to come in under this section and call upon the executor to prove the will in solemn form—Brinda v. Radhica 11 Cal. 492

A minor is entitled to apply through his guardian for revocation of a grant -- Sarada Prasad v Triguna 3 P.L.J. 415 (418) 46 I.C. 117

In the case of Gopes Chandra Dutt v Sylhet Loan Co Ltd 41 CWN 120 the question arose whether a person acquiring an interest in the estate of a testator subsequently to the testator's death is entitled to apply under sec. 263 of the Succession Act for revocation of a probate of the will The facts of the case were as follows The testator had certain shares in a Tea Company and after his death his son applied for transfer of these shares to himself. This transfer was made. Thereafter the son mortgaged his shares to the Sylhet Loan Company who obtained a preliminary decree on the mortgage Then followed a final decree The Company purchased these shares in execution of the mortgage decree. In the meantime one G applied for probate of a will alleged to have been executed by R. He obtained an order by which probate was granted of the will Thereafter the Sylhet Loan Company applied for revocation of the grant of the probate Their Lordships held that a person acquiring an interest subsequently by purchase of a part of the estate of the deceased was competent to apply for revocation of the grant of the probate Their Lordships (Mitter and Patterson JJ) observed in the judgment such an application for revocation of a grant can lie at the instance of the respondents who have accoursed an interest by way of mortgage in the shares which belonged to the deceased's estate is amply supported by authority. We may refer in this connection to the decision of their Lordships of the Judicial Committee in the case of Rajah Nilmoni Singh Deo Bahadoor v Umanath Mookerjee 10 Cal 19 where it was doubted whether a creditor of one of the testator's heirs who has attached a portion of the testator's estate in respect of his debtor's right title and interest therein can oppose the grant of probate or apply to have it revoled at least in a case which is not founded on the ground that the probate has been obtained in fraud of creditors. The question was not really decided by their Lordships of the Judicial Committee of the Privy Council for the simple reason that it was not necessary for their Lordships to decide that question Sir Richard Couch in delivering judgment in that case made the following observations which might be usefully quoted here. At page 87 of the report last paragraph Sir Richard Couch stated as follows -

The case in which this judgment was given was that of a purchaser from the heir but no distinction is made between a purchaser and an attaching redutor. Assuming that a purchaser can oppose the grant of a probate or apply to have it revoked (which their Lordships do not decide) they entertain grave doubts whether an attaching recitor can do so at least in a case which is not founded on the ground that the probate has been obtained in fraud of redutors. But as after hearing the Appellant's counsel upon the question of the execution of the will their Lordships, did not consider it necessary to hear the counsel for the Respondents the question whether the Rajah could apply for the revoca tion of the probate has not been argued before them and therefore they give no final opinion upon it.

The matter has been considered however in subsequent decisions in this Court and we have been referred to the decision in the case of Mokhadaynin Dasis - Aarnadhar Mandal 19 CWN 1108 which was also cited before the learned District Judge which lays down the proposition that a purchaser who had acquired by purchase an interest in the properties left by the deceased was entitled to be heard in the proceedings for grant of probate and that he was also entitled to make an application for revocation of the grant on the ground of just cause. In support of this decision Mr Justice Mookerjee and Mr Justice Beachcroft referred to an English case namely the case of Linday V Linday.

42 LJ (Prob.) 32 (1872) (which they had examined) where it was ruled that the person entitled to intervene in a proceeding for resocation of letters of administration or probate need not prove that he had an interest in the estate of the deceased at the time of his death. An interest acquired subsequently by purchase of a part of the estate of the deceased is sufficient.

292 An executor who has proved a will cannot as such executor take proceedings to call in question the validity of that will. He has no right to cite the persons interested under it to show cause why the probate should not be revoked—Wilhams (11th Edn.) p 460. Where a probate having been granted in the name of several persons as executors one of them applied for revocation on the ground that the will was a forgery and that he himself did not apply for probate and was not cited and that the probate was obtained behind his back held that the applicant for revocation not being one of the heirs nor in any wise interested in the estate had no locus stand to challenge the genumeness of the will though he was entitled to have his name struck out of the probate—Struath V Mukundram 12 C W N 731.

A person who claims specific property adversely to and not through the testator has not such an interest in the estate of the deceased as to entitle him to apply for revocation of the probate. His remedy is by a regular suit-Ralph v Hale 7 PR 1902 2 PLR 1902 When letters of administration were granted in respect of a will of a Hindu widow purporting to convey her stridhan property a petition r for revocation who alleges that the testatrix had no stridhan property and that the property which she purported to convey was the property of the joint family of which she was a member se a person who alleges that the deceased person had no estate of her own does not come under the description of a person interested in the estate of the deceased (sec 283) and is incompetent to make the application for revocation-Srieobind v Laljhars 14 CWN 119 (121) 2 IC 402 See also Perojshah v Pestons 34 Bom 459 and Abream v Gopal 17 Cal 48 Where the persons applying for revocation of a probate make a definite allegation that the deceased who was a Mohant had no estate of his own and that the properties which he purported to make over by will were held by him not in his personal but in his official capacity as the head of the mutt and actually belonged to the mutt the petitioners have no locus stands to make the application-Ram Das v Prem Das 10 Pat 817 13 PLT 594 AIR 1932 Pat 95 (96) 136 IC 296

The surety of a person who has been granted letters of administration is not a person interested in the estate and is not entitled to apply for revocation of the letters granted to the principal on the ground that the latter is wasting the estate. The surety is bound under the administration bond for the due administration of the estate. His proper remedy is to get some person entitled to the grant to apply—Gony v Ome 13 Bur LT Til 61 IC 56

The widow of the adoptive father of the testator who was only entitled to maintenance from her husband's estate had no such interest in the estate of the deceased testator as entitled her to apply for revocation of the probate of the will, her right to maintenance could not be affected by the will whatever its provisions much the—Garabin v Pratac Chandra 4 CW N 602.

Where in an administration suit it is found that the plainitif is claim against the administrator for a share in the estate is baired by limitation held that as the applicant has no right to claim his share of the estate from the administrator he has no interest which would support an application for the revocation of the grant of the letters of administration—Abdid Rahman v Maung Min 12 Bur LT 114-51 IC 2355

An objection that the application for resocation should not be entertained because the applicant had no interest in the property of the deceased must be taken at once and cannot be taken for the first time in appeal. After the Court functioned in the matter and annulled the grant of letters of administration the objection was of no use—Bulats Mal v. Shambhu Nath 6 Lah 180 A I R. 1925 Lah 428 88 I C. 896

Effect of acquiescence and delay -Where the petitioner comes to Court after considerable delay and knowledge or an acquiescence on his part is shown the Court will not allow him to re open the probate unless he offers some reasonable and true explanation of the delay-Manorama v Shita Sundars 42 Cal 480 19 CWN 366 Radhashyam v Ranga Sundars 24 CWN 541 (542) Nalm v Bejoy 21 CLJ 555 30 IC 12 A person who has for several years received benefits under a will cannot subsequently come forward to apply for revocation of the will-Radhashyam v Ranga Sundans 2' CWN 541 (545) 59 IC 664 Where the sole heiress of the testator applied for probate of the will and obtained it and the will was acted upon for ome years and then she applied for revocation of the probate on the ground that the will was forged held that after having admitted the genuineness of the document and taken advantage of it she could not apply for revocation of the probate-Babus Bacha Kumar v Babus Suras 17 IC 763 (PC) Similarly a person who had not only acquiesced in the proceedings for letters of administration but actively assisted the person who had applied for the letters of administration in obtaining the grant and on oath supported the statements contained in that application cannot afterwards come forward to ask the Court to revoke the letters of administration on the ground that those statements (which he himself supported) were untrue-Sheo Gopal v Sheo Ghulam 14 OC 77 10 IC 717 (718) Where an application for revocation of a probate was made after long delay eg 12 years after the grant of probate the application was rejected having regard to the fact that it was extremely difficult to get witness about 18 years after the execution of the will the persons competent to give the best evidence having died-hali Das v Ishan Chunder 31 Cal 914 (PC) 9 CWN 49 see also Profulla v Brojendra 51 IC 593 Hemlata v Radhoraman 51 IC 561 Where a minor heir represented by his mother effected a compromise with the executors and after attaining majority for five or six years acquiesced in the terms of the compromise and enjoyed the property received under the compromise and then applied for revocation of the probate which had been granted to his opponents as a result of the compromise it was held that he was barred by reason of his acquiescence and delay from contesting the will-Kunialal v Kailash 14 CWN 1068 (1073) 7 I C 740 Nalins v Bejos 11 I C 277 (Cal)

If a person is to be deprived of his right to have the will proved in his presence on the ground of acquiescence and waver he must be proved to have possessed full knowledge of the facts for there can be no acquiescence without full knowledge both of the right infringed and of the acts which constitute the infringement. There is a d stinction between a case where the acquiescence alleged occurs while the act acquiescend in is in progress and another where the acquiescence takes place after the act has been completed. In the former case the acquiescence is quiescence under such circumstances as that assent may be reasonably inferred from it. In the latter case when the act is completed without any knowledge or without any assent of the person whose right is infringed the matter must be determined on very different legal considerations.

A right of action has then vested in him and merely delay to take legal proceedings to redress the injury cannot by itself constitute a bar to such proceedings unless the delay on his part after he has acquired full knowledge has affected or aftered the position of his roponent. A person cannot be barred of his remedy on the ground of waver unless at the time of the affected waiter he is shown to hive been Lilly cognizant of his right and of the facts of the case. Shrama Charan v. Prafulla Sundars 19 C.W.N. 882 (886) 21 C.L.J. 557-30.

294 Just cause -It is an elementary principle that no question of the genumeness of a will arises for consideration till the Court has decided that the grant of probate mu t be revoked on one or more of the grounds specified in this section. The only matter for consideration upon an application for revocation of probate is whether the applicants have made out a sufficient cause for revocation. Until the applicant has made out a case for revocation, the question of genuineness of the will cannot be opened. But the application cannot be thrown out at this stage on the ground that the evidence adduced by the applicant is not sufficient to throw doubt upon the genuineness of the will-Mokshadayını V Kamadhar 19 C.W.N. 1108 (1109) 31 I.C. 702 Akhilesu arı \ Haricharan 40 CLJ 297 AIR 1925 Cal 223 81 1C 689 Durgagati v Scurabing 33 Cal 1001 (1008) 10 CWN 955 If the application discloses grounds upon which letters of administration may be revoked e.g. where it distinctly alleges that the grant was obtained by means of false suggestions the application should not be thrown out-Shoo Gopal v Shoo Ghulam 14 OC 77 10 I C 717 (718)

If a just cause is made out the Court is bound to revoke the grant of probate or administration and it is not left to the discretion of the Court to revoke or not to revoke—Pnya Nath v Saila Bala AIR 1929 Pat 385 (385)

The explanation of the term just cause in this section is exhaustive and not merely illustrative so that an application for revocation must fall under one or more of the grounds mentioned therem—Harris v Spencer 38 Bom L R 708 A I R 1933 Bom 370 (373) Annoda v Kali Krishna 24 Cal 95 Bal Gangadhar v Sakuarbai 26 Bom. 792 Subroja v Rangammai 28 Mad 161 (164)

295 Clause (a)—Defective proceedings—Where the attorney for the executive and the District Judge were both aware that the effects of the testator custed outside the province of Punjab but still the one applied for and the other granted letters of administration not with the will but with a copy of the will annexed and the will was not filed as prescribed by sec 294 the proceedings to obtain the grant were so defective in substance that the grant should be annulled under this section—In the goods of Grant 1 PR 1902 37 PLR 1902

Where the High Court granted probate of a will to the Official Trustee on the ground that he could be appointed executor held that although the grant was erroneous it could not be said that the Judge acted without jurisdiction and the probate could not be revoked—Official Trustee \( \) \

It is illegal to grant letters of administration limited to a portion of the property (see Notes under sec 218) therefore if the District Judge grants letters of administration in respect of only one quarter of the property there is just cause for revocation within the meaning of this section—Sarada Prasad v Trieura Channa 3 PLI 415 (148) 46 IC 117

296 Absence of citation —Where letters of administration had been granted to the brother of the testator without issuing a citation upon an executive appointed in the will as was imperatively required by ec. 229 held that the proceedings were defective in substance and this circumstance constituted a good ground for revocation of the letters of administration—Horimusi; v Bai Dhanbain; 12 Bom 164

The Bombay High Court makes a distinction between compulsory citations and discretionary citations. A case of compulsory citation is to be found in sec 229 and a case of discretionary citation in sec 283 Where the compulsory citation has been omitted the grant would be defective and it should be revoked as soon as the defect comes to the notice of the Court Where however citation has been discretionary and a person who may be interested in disputing the genuineness of the will is not cited and probate is granted ex parte the mere absence of citation does not invalidate the grant because the will may be a perfectly genuine will and the opposition of the person who ought to have been cited might if it had been put forward have proved ineffective-Digambar v Narayan 13 Bom LR 38 9 I C 354 Harrison v Spencer 35 Bom LR 708 AIR 1933 Bom 370 (374) But the Calcutta High Court holds that Illustration (ii) of this section refers not only to cases where it is imperative on the Court to issue a special citation but it refers to all cases where the grant is made without citing the parties who ought in the opinion of the Court to have been cited and the absence of citation in the latter case is a sufficient ground for revocation of the probate-Robells v Rebells 2 CWN 100 (105) Where an application was made by a person for letters of administration and the petition made no mention of the existence of the brother of the deceased who was his partner in his business and no citation was issued to the brother held that the letters must be revoked by reason of the absence of citation-In the goods of Ganga Bisson 2 CWN 607 Where an heir at law has not been cited in an application for probate of a will he is entitled to make an application for revocation or for proof of the will in solemn form-Elokeshs v Hart Prasad 30 Cal 528 7 CWN 450 Where a petition for probate contained false statements as to the relations of the deceased 10 where the petition mentioned the names of some of the relations and omitted the names of other persons who were also near relations of the deceased and were entitled to intervene in the probate proceedings and in consequence the Court did not direct the issue of special citations on the latter persons held that there was just cause for revocation-Syama Charan v Prafulla 19 CWN 882 (884) 30 IC 161 Charubala v Menaka Sundars 36 CWN 1010 (1012)

In other Calcutta case however it is remarked that absence of citation or failure to serve the notice is not sufficient to revoke a probate the proper course for the Judge is to give the executor an opportunity for proving the will in solemn form—Saroja Sundan v Abboy Charan 41 Cal 819 (824) 24 JC 27

Where the Judge before granting letters of administration omitted to issue criations to certain necessary parties but the parties themselves did not object to the grant held that although the proceedings were defective and the Judge did not exercise a sound judicial discretion in making the grant without issuing citations still in the circumstances of the case the omission was not a fatal defect —Rammaja v Belty Mahbert 31 CWN 160 100 IC 177 ATR 1927 Cal 207

The absence of citation upon a minor whose interests are affected by a will would be a just cause for revoking the probate. In applying for probate of a will which affects the interests of a minor the proper course would be to serve

the minor with a notice and to have a proper guardian ad litem appointed for him Rebells v Rebells 2 CWN 100 : Akhileswars v Hats Charan 10 CLI 297 81 IC 639 A J R 1925 Cal 223 (221) Where an applicant for probate of a will took out citation upon a minor who was represented by the applicant himself as cuardian held that under the law citation is taken out against such parties as are interested in contesting the application for probate such parties being as it were defendants to the proceedings, in the matter of the grant of probate; that the applicant could not represent both his own interest and the interest of the minor. That the citation taken out was no citation at all and that the proceedings were defective it substance and the grant should be revoked. The proper course in such a case would be to have somebody appointed by the Court to act as guardian for the minor and to take out citation against the minor as represented by the guardian or by an officer of the Court having no Brindaban v Sureskuar 10 C.L. I 263 (274) 3 I.C. 178 (185) But there is a broad distinction between cases of brobate and cases of letters of administration in the matter of citations, for in the former case the proof of will in a majority of cases, if not in all acts prejudicially to the legitimate rights of those who would inherit or be estitled to the properties in the absence of a will and omission to cite them is likely to affect such rights of theirs in their absence while in the latter case such omission only affects their preferential right to administer or prevents them from objecting to the personnel of the administrator or to like matters and it is not until there is any mal administration that they are really affected. And so where in proceedings for grant of letters of administration it was represented that certain minors who were interested were away in Burma and consequently notice was addressed to their mother as guardian living in a near place and the mother took part in the proceedings and did not do anything injurious to the minors but she was not formally brought on record as guardian ad litem held that the minors were effectively represented and that the absence of the formal order did not invalidate the grant of letters of administration nor was it a ground for revocation of the grant-Ranmaya v Betty Mahbert 31 CWN 160 100 IC 177 AIR 1927 Cal 207 (distinguishing 2 CWN 100 12 CWN 6 and 40 CL I 297)

Where a petition for probate prayed for the appointment of a guardian ad little for a minor to whom citation had to be issued but he refused to accept citation on bhealf of the minor and probate was granted held that the minor was not properly represented in the probate proceedings and that he was entitled to apply for revocation of the grant. In such a case the fact that the person who was sought to be appointed guardian ad litem was a fit and proper person to be the guardian is immaterial. The main question is whether he consented to be the guardian II he did not consent to be the guardian II he did not consent to be the guardian. If he did not consent to be the guardian II he did not consent to be the guardian. If we were defective and the probate must be revoked. Sachindra v Hinomonev. 24 C.W. 1538. (540) 59 IC. 435. Where in the

proceedings for taking probate of a will which purported to disinherit a minor notices were issued to the minor and her guardian (mother) but the person who accepted the service of notice on behalf of the females was one who fived as a servant and under the immediate control of the person who propounded the will and the guardian was not aware of the proceedings and it further appeared that both the minor and her mother (guardian) also were living under the immediate protection and influence of the propounder held that in the peculiar circumstances of the case the guardian was not given any opportunity to oppose the grant of probate and the service of notice was ineffectual. The grant of

probate must be revoked-Ramanandi v. Kalauati 7 Pat 221 (PC) 9 PLT 97 32 CWN 402 (407 408) 54 MLJ 281 107 IC 14 AIR 1928 PC 2, Haimabati , Aunja Mohan 35 CWN 387 (392) AIR 1931 Cal 713 135 IC 282 But mere omission to serve a special citation would not by itself be a sufficient ground for revoking the grant if it was shown that the person on whom the citation ought to have been served was otherwise aware of the proceedings-Prem Chandra v Surendra 9 CWN 190 Nistarini v Brohmo most 18 Cal 45 Sanja v Abhoy 41 Cal 819 Venkatarathnam v Satyavats 46 MLJ 383 AIR 1924 Mad 578 (581) 79 IC 44 Kanhas v Jogendra 1 Pat. 86 (89) 69 IC 611 AIR 1922 Pat 406 And the fact that the person who complains of absence of such citation is a minor makes no difference -Nistarine v Brohmomoje 18 Cal 45 (47) The burden of proving that the person on whom citation was not issued had otherwise a knowledge of the proceedings, lies on the party who alleges such knowledge it is not necessary for the person who applies for revocation to prove that he had no knowledge of the proceedings-Syama Charan v Prafulla 19 CWN 882 (886) Prem Chandra v Surendra supra

The absence of citations in a case in which they are ordered but did not issue does not by itself constitute just cause for revocation of probate though it may do so if the party claiming that citation should have been ordered and served upon him can show a prima facre case for revocation which the executor is unable to rebut In cases where citations have been ordered but not served the burden of proof is then shifted to the executor to show that there was no defect of substance in the proceedings in which probate was granted. In cases where citations have not been ordered the party impugning the will on the ground of his non citation must first show that he ought to have been cited before the burden of proof is shifted to the executor to show that the defect in the proceedings was not one of substance and that no just cause for revocation exists—Euseof v Ismail 176 I C 614 A IR 1938 Rany 261 IF B)

Absence of citation to a person who had sold away her interest in the estate and was represented in the probate proceedings by her vendee was not a just cause for revocation of the probate—Mangla v Samson 51 I C 24 (26) (Nag )

A person who has acquired an interest in the estate of a testator subsequently to the testator's death is entitled to a general citation only and not to any special citation—Gopes Chandra v Sylhet Lean Co 41 C WN 120

Clause (b)-Grant obtained fraudulently, etc. -A grant of etters of administration which has been obtained fraudulently is void ab initio -Debendra v Administrator General 33 Cal 713 10 CWN 673 Where probate has been obtained by fraud on the next of kin equity interferes and either converts the wrong doer into a trustee in respect of such probate or obliges him to consent to a repeal or revocation of it in the Court in which it was granted -Barnesley v Powell 1 Ves Sen 119 284 287 Where A having applied for the probate of a will caused citation to be issued to B who but for the will vould inherit a portion of his estate but the notice was served on B a week after B had assigned his interests to C neither B nor A who presumably knew of the transfer by B brought the fact of assignment to the Court's notice and probate was granted without the assignee's getting any notice of the proceedings held that the proceedings were bad because the grant was obtained fraudulently by making a false suggestion or concealing from the Court some thing material to the case-Morshadayini v Karnadhar 19 CW.N 1108 (1109) 31 I C 702 Where eight years after the death of B, one of his son L obtained letters of administration with a copy annexed of an alleged will left by B which if genuine would deprive another son 5 (who had meanwhile become heavily involved in lebt) of a very large share of his inhiratione held that the creditors of S were entitled to apply for revocation of the will their application being based on the ground that the administration had been obtained in fraid of creditors—Lekhi Naiani v. Mullan Chand 16 C W N 1099 (1101) 15 I C 686

Where only a draft of the will was found a statement that the will has not been found alter due search does not amount to a false and fraudillent state ment—Hans v Spencer 35 Bom 1R 708 A 1R 1933 Bom 370 (373) Where in a petition for probate the executor was described as an inhabitant of Calcutta but it appears that he had no fixed abode in Calcutta fould that having regard to the facts of the case that the testator carne to Calcutta for medical treatment and it was not known how long he might have remained in Calcutta it could not be said that the executor practised fraid upon the Court by describing the testator as an inhabitant of Calcutta and that the probate could not be revoked on that ground—In the goods of Mohendra 5 CWN 377 (381) A mere false statement does not amount to a fraudulent statement if there is no intention on the part of the person making it to deceive or conceal—Harris v Spencer supra

If a probate is granted in consequence of a compromise between the disputants resulting in the withdrawal of the opposition it cannot be afterwards revoked except on proof of fraud or orcumiention practised either upon the Court or upon the parties—Nicol v Askew (1837) 2 Moo PC 88 Kunja Lal x Kaulah 14 CWN 1068 (1071)

Clause (c)-Untrue allegation of fact -This clause states that just cause exists where the probate is obtained by making a false repre sentation. This expression is sufficient to cover a case where it is alleged that the will of the testator is a forked will as it may be said that the grant has been obtained by means of an untrue allegation of a fact essential in point of law to justify the grant -In the goods of Mohendra 5 CWN 377 (381) Letters of administration would be revoked if it was afterwards discovered that the property of the deceased was outside the jurisdiction of the Court which granted the administration and the applicant was ignorant of it at the time he had made the application for the grant-In the goods of De Silva 25 All 355 Where a woman claiming to be the widow of the intestate but who had not been legally married obtained administration to the deceased as her husband the grant was revoked-In the goods of Moore 3 Notes of Cas. 601 Where the testator was erroneously supposed to have been killed in battle and probate of his will was granted but it sub-equently transpired that he was not dead and he appeared personally in Court the probate was cancelled and the will returned to him-In the goods of Napier 1 Phillim, 83 But a mere mis statement as to the date of the decease in an application for obtaining letters of administration is no ground for revoking the same-Mana Abu Bacher v Bee Bee 4 Bur L J 73 A I R 1925 Rang 236 (237) 88 I C 614

299 Clause (d)—"Uscless and moperative"—The words uscless and moperative imply the discovery of something which it known at the date of the grant would have been a ground for refusing it as for example the discovery of a later will or content or a sub-equent discovery that the will was forged or that the alleged testator was still living—Bal Gangadhar Tilak v Sakuabai 26 Bom 792 Gour Chandra v Sundari 40 Cal 50 16 CWN 880 Thus what would not have furnished a ground for refusing probate can

furnish no ground for revoking it. A testator after appointing executors provided that they should manage the estate on behalf of his minor son until he attained majority, probate was obtained of the will, and on the death of that son the testator's widow applied for revocation of the probate on the ground that as on the death of h r minor son the property vested in her as his heir the grant of probate became useless and inoperative. It was held that the grant of probate did not become useless and inoperative because in view of the above interpretation of these words it was immalerial whether there was anything for the will to operate upon and the only question in a grant of probate was the genuineness of the will and not anything as regards the devolution of property and that as the circumstances v hich had interviend with regard to the devolution of property would not have justified the refusal of probate if they had existed at the time at which it was granted they were no grounds for revocation—Ball Gargadhar Filel v Sakkarbar 28 Bom 792.

But a later Calcutta case expresses the view that this clause is not only applicable to cases where the circumstances which have made the grant useless and imperative were in existence at the date of the grant though unknown to the Court and to the parties con erred but it applies also to cases where the circumstances contemplated have happened offer the date of the grant. This is evident from Illustration (vin) which says that a grant of probate or letters of administration may be revoked if the grantee subsequently becomes of unsound mind. And so where the District Judge found that the security furnished by the executor had become worthless and called upon him to furnish additional security within a certain time and the executor falled to do so held that it was a sufficient ground for revoking the probate—Swiendra v. Amrida Lal. 47 Cal. 115. 23 C.W.N. 763. 51.I.C. 936.

An instance of how a grant becomes useless and inoperative is given in Illustration (vini). This seems to show that the clause contemplates that there is an administrator who however under certain circumstances is incapable of acting so that the estate is practically without an administrator the clause does not mean that there is an administrator but he is willfully withholding the legacies payable under the will. That would be a case of mal administration by the administration of a grant—Stah Chaudra v. Bhabatarini 32 C.W.N. 993 (995). 48 C.L.J. 262 114 I.C. 794 A.I.R. 1292 G.a. 695.

A grant does not become useless and inoperative merely because the administrator has nothing more to do than to distribute the legacies to the several legacies. So long as the legacies are not paid to the legacies it cannot be said that the estate has been fully administered and that the grant has become useless and inoperative—State Chandra v Bhabatarin sunns.

If a grant is limited in duration (eg if the Court grants probate limited during the minority of the testator's son) is it necessary, to make an express order of revocation on the ground that the grant has become useless and inoperative when the time specified has elapsed? There is a divergence of judicial opinion on this question. In the following cases it has been assumed that no revocation is necessary because the grant spso facto ccases and expires on the termination of the period specified—In re-Metcalle (1822) 1 Add 343 Metcalle v Metcalle (1824) 2 Add 348 Stater v May (1705) 1 Salls 42 On the other hand in several other cases the view has been favoured that a formal order of revocation is necessary—In the goods of Philips (1824) 2 Add, 335 IA the goods of Philips (1824) 2 Add, 335 IA the goods of Niceton (1813) 3 Curt. 428 Runsford v Toynton (1800)? Ves. 400. There is no Indian case law on the subject. In Hemangini v Sarat Sundari

34 CLJ 457 66 IC 882 AIR 1921 Cal 292 (294) the point was merely raised but not decided as it did not directly arise for decision

Where it was found that though after the grant of probate the estate vested in the universal legatee there still remained some duties to be performed by the executor it could not be said that the grant had become inoperative through circumstances—Chandra Kumar v Prasanna 48 Cal 1051 (1055) 25 CWN 977

Where probate having been granted in the province of Sind the Insurance Company whose head office was situated in Bombay refused to pay the money on the ground that the probate was inoperative in Bombay the applicant was entitled to have the grant annulled to enable her to apply for a fresh grant in proper form—In re DeSon a 1 SLR 177 Where the administrator was convicted of criminal breach of trust and sentenced to a term of imprisonment (although the offence was in no way connected with the decreased setate or with the administration in his capacity of administration held that the grant became useless and inoperative and the letters of administration granted to him were revoked—In re Patterson 2 CWN CCCX

Where the Distinct Judge at first made an order for grant of letters of admunstration and also passed an independent order requiring the applicant to furnish security which the applicant failed to do it was held that since the order granting letters of administration was not conditional on the furnishing of security it could not be said that the failure to give security rendered the grant useless and inoperative so as to be a ground of revocation of the letters—Parbativ Prem Sukh 2D PLR 105 86 IC 553 AIR 1925 Lab 354 (355) (This decision has been modified on appeal on another ground Prem Sukh v Parbatic teld under Note 302)

Where one of several joint executors or administrators became a lunatic the Court on the application of the others revoked the grant and made a fresh grant to the applicants—In the estate of Shaw [190a] P 92 In the goods of Phillips (1824) 2 Add 335 336 In the goods of Neuton (1843) 3 Curt 428; In the goods of Marshall 1 Curt 297

300 Clause (e)—Omission to file inventory and account — Mere failure to file the inventory and account is not a sufficient ground for revocation of the grant it must be established that the grantee has wilfully and without reasonable cause omitted to exhibit the inventory and account—Piem Chand v Surendra 9 CWN 190 Hemlata v Radharaman 51 IC 561, Gokul das v Putushottam 4 Bom L R 979 Itill v Bird Sty 102 Nor is it enough if the inventory or account is incorrect; but it must be untrue in material respects—Goluldas v Putushottam supra The Court is not bound to revoke a probate on the ground of an inaccurate inventory especially where the value of assets left by a testator is almost a matter of conjecture and perfect accuracy can hardly be expected—Preakdastanamy v Subbarayaku 31 IC 435

The party applying for revocation of a probate under this clause on the ground that the accounts and mentory are untrue in material respects should pecifically state what items in the accounts and mentory are untrue and in what respects they are untrue. It is not enough to make vague allegations that the accounts and the inventory are untrue—Chandra Kumar v. Prasanna 48 Cal. 1051 (1067–1068) 25 C.W.N. 977

A riere delay in the exhibition of the inventory is not tantamount to originate to file inventory—Chandra humar v. Prasanna supra.

300A. Remedy of beneficiary when executor misappropriating money and submitting untrue accounts —Where the beneficiary thinks

that the executor has been nusappropriating money and submitting untrue accounts to the District Judge his remedy is to apply under sec 263 (o) to revoke the grant of probate to the executor on the ground that he has exhibited an account which is untrue in a material respect—Promotha Nath v. Gour Das A I R. 1938 Cal 294

300B Probate caterorum—Practice —In the case of In the goods of Mussammat Goleb Days 43 CWN 1193 there was an application for the recoration of a grant of letters of administration limited for the purpose of representing the deceased in a suit and for grant of probate to the executors mamed in the will of the defendant deceased. As upon the death of the defendant the executors were asked repeatedly to get themselves substituted in the suit but they deliberately refrained from taking any steps in the matter the Court appointed an administrator at litem to represent the deceased defendant. Sen J observed The Court may revoke a grant of letters of administration on the ground mentioned in sec. 263 of the Indian Sucression Art. In my opinion no just cause has been shown to exist within the meaning of that section

As regards the question whether the petitioner can get probate it seems to me that there is no reason why they should not be given a supplementary grant of probate keeping the grant to the administrator ad litem intact. I have not been shown any provision in the Indian Succession Act or any Indian authority regarding that matter. Learned counsel on behalf of the petitioner has referred me to the case of In the goods of Brown LR 2 P & D 455 (1872). There it was held that a supplementary grant may be made in circumstances similar to the present one. I consider that the English practice should be followed in this case. I therefore direct that a cultivision grant of probate will issue to the applicants.

What are not just causes -The explanation of the just cause in this section is exhaustive and not merely illustrative and hence mis management of the estate by an executor is not a just cause as it does not come under any of the clauses enumerated-Annada v hals hrishna 24 Cal 95 Gour Chandra v Sarat Sundars 40 Cal, 50 16 CWN 880 So also the unfit ness or incompetency of an executor does not fall within the meaning of just cause -- Hara Coomas v Doorgamons 21 Cal. 195 The mere fact that the executor of a Mohunt's will had, since taking charge of office taken to an immoral course of conduct resulting in his exclusion from the community of Mohunt was held to be no ground for revocation of the probate-Mohundas v Luchmundas 6 Cal 11 Failure to give security in accordance with the order granting letters of administration is not a ground for revocation of the letters when the order granting the letters was not conditional on the furnishing of security but the order requiring the grantee to give security was independent of the order for the grant of letters-Parbats v Prem Sukh 26 PLR 106 86 1 C 563 A I R 1925 Lah. 354 (355) (distinguishing Surendra v Amrita 47 Cal 115) Where the administrators quarrelled among themselves as a result of which they found it difficult to work harmoniously and administration became impossible held that this was not a cause for revoking the grant- Gour Chandra v Sarat Sundars 40 Cal 50 The mere fact that there was some delay in taking out probate was not a just cause for its revocation when the delay (which was only six years after the testator's death) was accounted for by the fact that until the date of the application for probate there was no very urgent necessity for relying upon the will-hah Das v Ishan Chunder 31 Cal 914 (PC) 9 CWN 40 An administration properly granted would not be revoked on the mere suggestion that it would be for the benefit of the estate to grant it to some

other person even though all the parties consent and the grantee himself applies for the reocation—In the goods of Heslop 1 Robert 457 Mal administration of the estate is not a just cause for revocation of the letters of administration— Srish Chandra v Bhabatamin 32 CWN 933 (995) AIR 1928 Cal 695

302 Miscellaneous —In a proceeding for revocation it is not neces sary for the applicant to implied those persons to whom alienations of the property have been made since the granting of the probate. Such persons are not necessary parties because in a revocation proceeding the Court is not concerned with the question as to what will happen to the aliences if the will is eventually found to be invalid. But after revocation the aliences if they choose may intervene and opportunities should be afforded to them of being heard when the executor is called on to prove the will in solemn form—Hammabati v. Kunja Mohan 35 C.W.N. 387 (394). A.I.R. 1931 Cal. 713. 135 IC. 282.

The validity of a decree against an executor is not affected by the subse quent revocation of the probate. The decree is binding on the estate and on all heirs and representatives of the testator—hfa Thein v Nepsan 9 Rang 360 AIR 1931 Rang 283 (285) 133 IC 494

The grant of a probate is no bar to a suit for the establishment of the right of any person prejudiced thereby or for the construction of the will and the decree in any such suit supersedes the grant of probate and no proceedings for the rivocation of the probate are necessary—Kajendra v Manick Lal 8 Al. I 1083 I I IC 235

An order granting letters of administration cannot be cancelled suifnoil name to the person in a hose favour it has been passed—Parman \ Bhora Nek Ram 37 All 380 13 AL J 441 29 IC 137 Notice should be given by the Judge to the executor and all persons interested under the will or claiming to have an interest in the estate of the deceased. The Judge if he thinks proper may call upon the executor to prove the will again in the presence of the objector (applicant for revocation) notwithstanding the prior probate—Romulachin v Nilmittim 4 Cal 380 (383) Prem Chandra v Surendra 9 CW N 190 If in the prior probate proceedings the will had been proved merely in common form its summanity and exparts without any opposition then on an application for revocation the Judge should have the will regularly proved afresh by the executor so as to give the applicant for revocation an opportunity of testing the evidence in support of the will before calling upon the applicant to produce his own evidence to impeach it—Romullochian \ Nilmittim 4 Cal 380 (364)

But if there had already been a full inquiry as to the genumeness of the will the Judge will take the previous grant of probate as a prima face evidence of the will and the onus of impeaching it will be shifted on to the objector—Komullochun v Nilvitium supra Until the applicant has made out a case for revocation the genumeness of the will cannot be questioned—Durgagati v Saurabius 33 Cal 1001 (1008) 10 CWN 9.5

Where letters of administration have been granted to a widow and she deals with the property under the orders of the Court the remedy of the reversioner questioning the propriety of the grant is to apply for revocution of the same He cannot attack the grant indirectly by instituting a suit to declare the invalidity of an alteration made by the widow—Annada Charan v. Alul. Chandra. 23 CWN 1045-54 IC 197

Where merely an order has been made that probate should issue to the executing but no probate has been actually taken out the Court has no jurnsdiction to revoke a grant which has never been issued—Jamsetji v Huyubhai 37 Bom. 1.88 19 IC 406 So also the Court cannot revoke the letters of

administration before the letters have actually been granted. Thus where the Court passed an order for the grant of letters of administration to the applicant and at the same time directed him to give a bond with a surety and on the applicants failure to give the security the Judge revoked the grant of letters of administration held that as the letters of administration were not actually granted to the applicant (and in fact could not be granted without his furnishing the security as directed by the Court) the Judge's order revoking the grant was not proper. The Judge ought to have untilations the order for grant of letters of administration—Prem Sukh v Parbati 7 Lah 270 27 PLR 384 94 IC 329 AIR 1926 Lah 352 on appeal from Parabati v Prem Sukh cited in Notes 299 and 301.

303 Fresh application for grant -Where a grant of letters of administration made by a District Judge has been revoked under this section the Judge has nevertheless jurisdiction to entertain a fresh application for a grant of letters of administration-Brij Lal v Secretary of State 20 All 109 (110) In England if letters of administration are granted to a person and another person who claims an interest under an alleged will applies for revocation of the letters and for obtaining grant of the probate of the will both these matters are decided in one and the same proceeding. If the will is valid the grant of administration is revoked and in the same proceeding a probate is ordered to issue in solemn form to the person applying for it. He is not required to make a fresh petition for the grant of probate. See Mortimer on Probate Law and Practice p 585 But this procedure is not followed in India. In this country when a grant is revoked fresh proceedings have to be instituted by way of a fresh petition in order to obtain a grant of probate or letters of administration (as the case may be)-Harris v Spencer 35 Bom L R 708 A I R 1933 Bom. 370 (372)

But no regular suit is necessary for that purpose—Harris v. Spencer supra Brij Lal v. Secretary of State supra

Res Judicata —A person who has unsuccessfully attempted to revoke a grant of probate which is revoked subsequently at the instance of some other party cannot reagitate the matter in a subsequent application for a fresh grant by entering caveat. Where the matter thus sought to be reagitated is covered by the previous decision awarded against such caveator in dismissing his application for revocation it is res judicate—Rallabandy v. Y an immendra 46 MLJ 383 In the goods of Ray Arishna Mukherjee 39 C.W.N. 1071

304 No limitation —There is no period of limitation (or making an application for revocation of a probate and probate was revoked in a case after the lapse of 32 years—Shjamid v Remissian 22 CLJ 82 though it was also observed in this case that a person may be debarred by long delay in making such application—Ibid (at p 100) See also Hamabati v Kunja Mohan 35 CWN 387 (390) ATR 1931 Cal 713 125 IC 282 where a grant was revoked after 32 years on the ground of absence of proper citation on the mutor. Mere delay in applying for revocation is irransterial if it does not lead to an inference of waiver—Isuim humar v Sukhaharan 35 CWN 568 (570) ATR 1931 Cal 717.

Where in an administration suit it is found that the plaintiff's claim against the administrator for a share in the edite is barred by limitation the deter miniation of this case is res judicate as regards an application by the same plaintiff for a revocation of the grant of administration— think Rahaman v. Maung Min 12 Burl T. 114, 51 IC 355

### CHAPTER IV

# O1 THE PRACTICE IN GRANTING AND REVOKING PROBATE AND LITTIRS OF ADMINISTRATION

Section 235 Act \ of 1865 Section 51 Act V of 1881

Section 2 Act V of Section 2 Schedule I Act XXXVIII of 1920

(1) The District Judge shall have jurisdiction: granting and revoking probates an Jurisdiction of District

letters of administration in all case Judge in granting and revoking probates etc within his district

(2) Lucept in cases to which section 37 applies, no Cour in any local area beyond the limits of the towns of Calcutta Madras and Bombay, shall, where the deceased is a Hindu Muhammadan, Buddhist, Sikh or Jaina or an exempted person, receive applications for probate or letters of adminis tration until the Provincial Government has, by a notification in the provincial official Gazette, authorised it so to do

Note -The words and the province of Burma have been omitted by the Government of India (Adaptation of Indian Laws) Order 1937

Scope of section -- Prior to the Probate and Administration Act (V of 1881) the powers of District Courts respecting grants of probate or letters of administration (with the will annexed) were confined to cases of wills made on or after the 1st September 1870 (se to those wills to which the Hindu Wills Act 1870 applied) See Luchmun v Dukharan 6 CLR 138 But since the passing of the Probate and Administration Act applications for grants of probate or letters of administration can be entertained by District Courts even in respect of wills made prior to the 1st September 1870-Krishna Kinkur v Ros Mohun 14 Cal 37 Arishna Ainkar v Panchuram 17 Cal 272 (275)

District Judge -In Assam the jurisdiction in granting probate and letters of administration under this section is vested in the Judicial Commissioner who exercises the functions of a District Judge and not in the Deputy Commissioner who exercises the functions of a Collector-Thakur Krishto Surma v Basoodeb 12 WR 424

An Additional District Judge to whom the functions of the District Judge relating to the grant and revocation of probates have been assigned under sec. 8 (2) of the Bengal Civil Courts Act XII of 1887 has power to revoke a probate granted by the District Judge-Daho Kuer v Tural Det 3 Pat 609 (612) AIR 1924 Pat 593 78 IC 701

The expression District Judge includes a High Court-In to Kuppusuami 53 Mad 237 A.I.R 1930 Mad 779 (780) 126 I.C 481

Grounds upon which probate can be impeached in Civil Court -The only grounds upon which probate can be impeached in a Civil Court are those stated in sec 44 of the Evidence Act viz that the probate was granted by a Court not competent to grant it or that it was obtained by fraud or collusion which means fraud or collusion upon the Court and perhaps also fraud upon the person disinhented by the will executed by the testator or was procured by a fraud practised upon him-In re Bhobosoondars Dabee 6 Cal 460

Revocation of grant of probate-Correct method of approach by Court .... An applicant for revocation of a grant of probate takes upon himself the burden of displacing the evidence which there is regarding the execution and attestation of the will. Where there is direct cogent and positive testimony of all the attesting witnesses of a will as to its execution and attestation the Court should not instead of applying its mind to a dispassionate consideration of that evidence start off making all kinds of speculations as to the circumstances of suspicion which make it improbable that the will could have been executed In order to repeal the effect of such positive testimony regarding execution an improbability must be clear and occent. It must approach very nearly to if it does not altogether constitute an impossibility. If a person who takes it upon himself to dispute the genuineness of a will rests his case on suspicion the suspicion must be a suspicion inherent in the transaction itself which is challenged and cannot be a suspicion arising out of a mere conflict of testimony. This is the correct method of approach for Courts called upon to deal with testamentary cases It can never be a afe or sound rule to start speculating as to what might have been the motive which impelled the testator to make an alleged will provided there is evidence and the Court has every right to call for such evidence and must in fact call for it-that the will was in point of fact executed as required by law. The mere fact that a will is not registered is not such a circumstance as must ipso facto tell against the genumeness of the will-Kristo Gopal v Baidya Nath ILR (1938) 2 Cal 173

(1) The High Court may appoint such judicial Section officers within any district as it thinks 235 A Act Power to appoint De legate of District Judge fit to act for the District Judge as Dele- Section 52 to deal with non conten gates to grant probate and letters of Act V of tious cases administration in non contentious cases, Section 2

within such local limits as it may prescribe Provided that, in the cases of High Courts not established by Royal Charter, such appointment shall not be without the previous sanction of the Provincial Government

- (2) Persons so appointed shall be called "District Delegates "
- 307 This section authorises the District Judge by implication to transfer a case to the District Delegate for inquiry and report-hunga Lal v Kailash 14 CWN 1068 (1070) 7 IC 740 A District Judge has power to transfer a probate case to the subordinate Judge under sec 23 (2) (d) of the Bengal Civil Courts Act XII of 1877-Kunjo Behars v Hem Chunder 25 Cal 340 An Additional District Judge is not to be presumed to be a District Delegate so as to be able to grant probate or letters of administration only in non contentious cases; he is to be deemed a District Delegate if he is appointed as such by the High Court If he is not so appointed but is exercising the powers of a District Judge he can grant probate or letters of administration in all cases whether there is contention or not-Ramsingh v Murtibas 68 I C 940 A I R 1923 Nag 41

The District Judges shall have the like powers Section 236 and authority in relation to the grant- 1865 District Judge's powers ing of probate and letters of adminis. Section 53 tration, and all matters connected 1881 as to grant of probate and administration

therewith, as are by law vested in him, in relation to any civil suit or proceeding pending in his Court

308 The construction of a will is not the function of a Court of Probate but such Court has power to contrue a will incudentally for the purpose of determining whether a testamentary document should be admitted to probate or whether any particular person is entitled to any grant—In the estate of Hopos [1904] P 192; In the estate of Lupton [1905] P 321 Nand Kishore v Pashu pati 7 Pat. 396 108 I C 323 VIR 1928 Pat 318 (319); Arunmosi v Mohendra 20 Cal 868

sec 19 If of the Court I ces Act. The words all matters connected therewith cannot apply to such proceedings. These words have reference to matters such as the revocation of probate the production of accounts and similar other matters. A proceeding under sec 19 If of the Coart Fees Act merely decides a revenue dispute between the Collector and the holder of a probate as to the valuation of the properties of the deceased. The District Judge has no power to award the costs of holding an inquiry into such dispute—Hinday Mohim v. Sceretary of State 50 Cal. 239 72 IC 472 A.I.R. 1923 Cal. 406 (40)

But the District Judge has no power to award costs of a proceeding under

Section 237 Act % of 1865 Section 54, Act V of 1881 267 (1) The District Judge may order any person to
District Judge may produce and bring into Court any paper
order person to produce or writing, being or purporting to be

be in the possession or under the control of such person

- (2) If it is not shown that any such paper or writing is in the possession or under the control of such person, but there is reason to believe that he has the knowledge of any such paper or writing, the Court may direct such person to attend for the purpose of being examined respecting the same
- (3) Such person shall be bound to answer truly such questions as may be put to him by the Court, and, if so ordered, to produce and bring in such paper or writing, and shall be subject to the like punishment under the Indian Penal Code, in case of default in not attending or in not answering such questions or not bringing in such paper or writing, as he would have been subject to in case he had been a party to a suit and had made such default
- (4) The costs of the proceeding shall be in the discretion of the Judge

The word truly h\_s been added to remove any doubt as to what is clearly the intention of the provision — Report of the Joint Committee

309 A duplicate is a part of a will and to be considered a testamentary rand as such it risy be ordered to be produced—Kultican v Parter 1 Cas. Temp Lee 662

268 The proceedings of the Court of the District Section 238 Proceedings of District probate and letters of administration Section 55

Judge's Court in relation to probate and administration

cedure, 1908

shall, save as hereinafter otherwise 1881 provided, be regulated, so far as the circumstances of the case permit, by the Code of Civil Pro-

This section is very wide. The Legislatu e has intended by this section that the C P Code should be read with the Probate Act mutatis mutandis-In the goods of Guru Charan 6 CWN cxlv11

310 Procedure of C P Code—Instances —An executor appointed under the will may make an application in forma pauperis for taking out probate of the will and if the Court is satisfied that the petitioner is a pauper and that there is none of the testator's estate to enable him to take out the probate it may grant him leave to apply for and obtain probate in forma pauperis-In re will of Dauuba: 18 Bom 237 (239 241)

An application for revocation of a probate may be made in forma pauperis -In te Gutu Charan 6 CWN cxlvii

The provisions of the C P Code as to the setting aside of ex parte decrees apply to an application to revoke the grant of probate on the ground of want of proper citation-Dintaring v. Dorbo Chunder 8 Cal 880 (882)

An order directing the issue of a grant of probate to the propounder of a will is one that is capable of execution and stay of execution of such a decree can be granted under sec 545 C P Code 1882 (O 41 r 5)-Brij Coomaree v Ramrick 5 CWN 781

A review of judgment is permissible. Thus an ex parte grant of letters of administration may be revoked by the District Judge by way of review (sec 114 C P Code) of the order granting the administration-Parman v Nek Ram 37 All 380 13 A L J 441 See Note 289A under sec 263

A Probate Court has the same powers in ordering an inventory to be made as an ordinary Civil Court has under O 39 r 7 C P Code-Giribala v Prokash 49 CLJ 484 120 IC 459 AIR 1929 Cal 496

For grant of injunction see Nirode Baran v Chamatkarini 19 CWN 205 cited under sec 247

But sec 103 C P Code 1882 (O 9 r 9 C P Code 1908) does not apply to probate proceedings and therefore the dismissal of an application for probate for default would not debar an application by another person claiming an interest under the will and therefore also necessarily by the executor him self for if probate has been refused not on the ments but merely by rea.on of defect of some matters of form or procedure there is no adjudication that the instrument is not entitled to probate and so it may be again propounded moreover an executor presenting an application for probate cannot be regarded as a plaintiff suing in respect of a cause of action within the meaning of O 9 r 9 C P Code-Ramans Debs v Kumud Bandhu 14 CWN 924 (926 928) 7 I C 126 Where an application for probate by a legatee has been dismissed for default it does not debar the legatee or persons claiming under him from filing a fresh application for probate or from pleading the existence of the will as a defence to a suit for the prop rty which they claim as belonging to them under the will-Ganshamdoss v Sarasuathibas 21 LW 415 AIR 1925 Mad. 861 (869) 87 IC, 621,

therewith as are by his vested in him, in relation to any civil suit or proceeding pending in his Court

308 The con truction of a will is not the function of a Court of Probate but such Court has power to construe a will incidentally for the purpose of determining whether a testamentary document should be admitted to probate or whether any particular person is entitled to any grant-In the estate of Hayes [1901] P 1921 In the estate of Lutton [1905] P 321; Vand Kishore v Tasha Patr 7 Patr 3 to 10d I C. 323 A FR 1964 Patr 348 (349): Asunmove v. Mohendra 20 Cal 858.

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Section 237 Act \ of 1863 Section 54. Act V of 1881

District Judge may order person to product testamentary papers.

(1) The District Judge may order any person to produce and bring into Court any paper or writing, being or purporting to be test iment iry, which may be shown to be in the possession or under the control of such person

- (2) If it is not shown that any such paper or writing is in the possession or under the control of such person, but there is reason to believe that he has the knowledge of any such paper or writing, the Court may direct such person to attend for the purpose of being examined respecting the same
- (3) Such person shall be bound to answer truly such questions as may be put to him by the Court, and, if so ordered, to produce and bring in such paper or writing, and shall be subject to the like punishment under the Indian Penal Code, in case of default in not attending or in not answering such questions or not bringing in such paper or writing, as he would have been subject to in case he had been a party to a suit and had made such default
- (4) The costs of the proceeding shall be in the discretion of the Judge

The word truly has been added to remove any doubt as to what is clearly the intention of the provision - Report of the Joint Committee

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Proceedings of District Judges Court in relation to probate and administration probate and administration shall, save as hereinafter otherwise 1881

provided, be regulated, so far as the circumstances of the case permit, by the Code of Civil Procedure, 1908

This section is very wide. The Legislature has intended by this section that the C P Code should be read with the Probate Act mutatis mutandis—In the goods of Guru Charan 6 CWN calvu

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An application for resocation of a probate may be made in forma pauperis

-In re Guru Charan 6 CWN exten

The provisions of the C P Code as to the setting aside of exparte decrees apply to an application to revoke the grant of probate on the ground of want of proper citation—Dintains v Dubb Chunder 8 Cal 880 (882)

An order directing the issue of a grant of probate to the propounder of a will is one that is capable of execution and stay of execution of such a decree can be granted under sec 545 C P Code 1882 (O 41 r 5).—Bris Coomaree V Ramitek 5 C W N 781

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For grant of injunction see Nirode Baran v. Chamatkarim 19 CWN 205 cited under sec 247

But sec 103 C P Code 1882 (O 9 r 9 C P Code 1908) does not apply to probate proceedings, and therefore the dismissal of an application for probate for default would not debar an application by another person claiming an interest under the will and therefore also necessarily by the executor him self for if probate has been refused not on the rights but merely by reason of defect of some matters of form or procedure there is no adjudication that the instrument is not entitled to probate and so it may be again propounded moreover an executor presenting an application for probate cannot be regarded as a plaintiff suing in respect of a cause of action within the meaning of O 9 r 9 C P Code-Ramans Debs v Kumud Bandhu 14 CWN 924 (926 928) 7 IC 126 Where an application for probate by a legatee has been dismissed for default it does not debar the legatee or persons claiming under him from filing a fresh application for probate or from pleading the existence of the will as a defence to a suit for the property which they claim as belonging to them under the will-Ganshamdoss v Sarasuathibas 21 LW 415 AIR 1925 Mad. 861 (869) 87 I C 621,

So also O 16 r 20 of the Code should not be so applied to probate proceedings as to dispense with the proof of the will So where a caveator refused to answer a question put to him the Judge ought not to dispense with the proof of execution of the will and to grant probate to the applicant—Rain v Vishiu 9 Born 241 (244)

311 Arbitration —An executor against whose application for probate a caveat has been entered cannot submit to arbitration the question whether the will propounded by him was duly executed by the deceased see. 508 C P Code 1882 (Sch II of the Code of 1908) providing for reference to arbitration by the Court is not applicable to probate proceedings—Ghéliaba v Vanduba 21 Bom. 335 see also Hem Chunder v Sarat Chunder 3 C W N Ixxviii If an application is made under see 257 for the revocation of a probate the Court cannot delegate the decision of the question raised in such application to arbitrators even with the consent of the parties such matter as the granting and revocation of probates being for the Court only—Cambelly V Simpton 72 PR 1894

Withdrawal —O XVIII r I which says that a plaintiff may with draw a suit or abandon a part of his claim does not apply to an application for probate. It is the duty of an applicant for probate to obtain an opinion of the Court upon the genuineness or otherwise of the will and he fails in his duty if he does not do so. The further provision in O XXIII r 1 to the effect that if a plaintiff withdraws from a suit he shall be precluded from instituting any fresh suit in respect of the same subject matter also does not apply. It is undestrable that if an executor does improperly withdraw an application for probate he should be precluded from again undertaking the discharge of his duty in obtaining the finding of the Court on the genuineness of the will—

Jugetimary V. Jegateham 2. P.L. J. 535 (537). 40 I.C. 345

So also the procedure of O XVIII r 1 does not apply to a proceeding for revocation of a probate And therefore when a party has obtained revocation of a probate on the ground that the will is a forgery it is not competent to him in the course of an appeal prepared by the executor to withdraw from the entire proceedings and thus compel the Court to revive the grant of probate of a will which has been pronounced to be a forgery—Sarada Kanta v Gobinda 12 C.I.J 91 6 IC 912 (917)

Compromise -In a proceeding for probate the will must be proved either in common form or in solemn form if the proceeding is conten tious it must be proved in solemn form. Unless the will is proved in some form no grant of probate can be made merely on the consent of the parties The only issue in a probate proceeding relates to the genuineness and due execution of the will and the Court is itself under a duty to determine it therefore an agreement or compromise as regards the issue of the genuineness of the will if its effect is to exclude evidence in proof of the will is not lawful within the meaning of sec 375 C P Code 1882 (O 23 r 3)-Monmohim v Banga Chandra 31 Cal 357 8 CWN 197 Sarada Kanta v Gobinda 12 CLJ 91 (96) 6 IC 912 Jugeshwar v Jagatdham 2 PLJ 535 (536) 40 IC 345 Janakbati v Gajanand 1 PLJ 377 (382) So when probate has actually been revoked by a Court of first instance on the ground that the will propounded is a forgery the parties are not entitled to bring the matter on appeal and then by compromise to obtain a reversal of the decision and a revival of the probate of the forged will without any adjudication on the ments. Such a compromise cannot be regarded as lawful within the meaning of O 23 r 3 of the Code-Sarada Kanta v Gobinda supra. It is a most unusual procedure to grant probate in terms of an agreement or compromise without proof of the will in common form—hamal Kumari v Narendia 9 CLJ 19 1 1C 573 (578) Bishimath v Sarju 1931 ALJ 835 133 IC 403 AIR 1931 All 745 (746) There can be no dismissal of a probate case in accordance with the terms of a petition of compromise The main issue in a probate case is whether or not the will have been proved and the only effect of a compromise is to reduce a contentious proceeding into one which is not contentious but this does not absolve the Court from the task of either granting probate or refusing it. If a compromise has been made and the objector withdraws from the contest the Court will grant probate in common form but the Court can not di miss the probate case in accordance with the terms of the compromise between the propounder and the objector—Janakati v Gajanand 1 PLJ 377 (379) 37 IC 12 20 CWN 986

There is no question and all the authorities are agreed with regard to this that unless a will is proved in some form no grant of probate can be made merely on the consent of parties It has been held that an agreement or com promise as regards the genuineness and due execution of the will if its effect is to exclude evidence in proof of the will is not lawful and no probate can be granted merely because the caveator con ents to the grant. Such an agreement is against public policy as the only issue in a probate proceeding relates to the genuineness and due execution of the will-Gours Sankar v Hars Bhabans 41 CWN 848 Ghellabhas v Nandaubas 21 Bom 335 Monmohins v Banga Chandra 31 Cal 357 Kamal Kumars v Narendra Nath 9 CLJ 19 where the genuineness of the will is not disputed the parties may settle their differences by compromise or agreement and such an agreement when fairly made will be enforced. So where on the executors propounding a will the parties settled their differences and the caveators withdrew their objections on the executors undertaking to pay them a fixed monthly allowance although the will provided an allowance to them only out of the surplus income held that the agreement having been made in order to settle a bona fide dispute was enforceable-Surja Prasad v Shyama Sundars 14 CWN 907 (970) 7 IC 550 See also Kunja Lal v Kailash Chandra 14 CWN 1068 (1070) where the Judge granted probate upon a compromise after being satisfied that the will had been proved

An order passed on a compromise does not operate as a bar o an application for a probate—Bropo Lol v Sharayubala 51 Cal 752 (754) 84 IC 154 AIR 1924 Cal 864

A probate cannot be taken out by consent of parties in an amended form te in a form which makes a distribution of property in a manner different from what is directed by the will. The parties beneficially interested under the will can agree to dispose of the estate in a particular manner after it reaches their hands in that case they are really dealing with their own property. Such an agreement can be given effect to by a redistribution among themselves after the executor shall have made over the property to them in terms of the will—Kamal Kuman v. Varianta signa.

When a probate is granted in common form by reason of a compromise between the parties the terms of the compromise examnot be embodied in the grant of probate for the reason that a Court of Probate cannot in many instances enforce the terms—Etans v Sounders (1861) 30 LJ PMA 184 But they may be enforced by an action in a Civil Court if they are otherwise unobjectionable—Lunya Lal v Aclassh 14 CWN 1068 (1072) 7 1C 740

313 No Limitation -\o law of limitation governs application for probate or letters of administration (though long and unexplained delay may throw doubt on the senumeness of the will propounded) Article 181 of the I imitation Act does not apply to such applications-In to Ishan Chandra 6 Cal 707 Gnanamuths v Vana Kodfillas 17 Mad, 379 Bal Manckhas v Manekji 7 Bom. 213; Kashi Chandra v Gopi Krishna 19 Cal 48 Janaki v Kesaralu 8 Mad 207 Indar Narain v Onkar Lal 20 PR 1912 10 IC 130 The reason for the exemption of applications for probate from the operation of the Limitation Act probably is that the application for probate is in the nature of an application for permission to perform a duty created by a will or for recognition as a testamentary trustee and the right to apply continues so long as the object of the trust exists or any part of the trust if really created remains to be executed-Gnanamuthu v Vana hodbilas 17 Mad. 379 (381) In this country wills are not generally propounded until it becomes absolutely necessary to propound them. Avoidance of probate duty is another ground for keeping back the will until there is strong reason for putting it forward. These are some of the reasons why a long period elapses between the death of the testator and the propounding of the will. Where there is a very long delay in propounding the will and the delay is explained the Court will only scrutinize the evidence very carefully but there is no rule of law of evidence that such a will is incapable of being proved-Binodini v Hriday Nath 22 CWN 424 (426) 45 I C 187

Section 239 Act X of 1865 Section 3 Act VII of 1901 269 (1) Until probate is granted of the will of a

When and how Distinct Judge to interfere for protection of property Judge, within whose jurisdiction any part of the property of the deceased

person is situate is authorised and required to interfere for the protection of such property at the instance of any person claiming to be interested therein, and in all other cases where the Judge considers that the property incurs any risk of loss or damage, and for that purpose, if he thinks fit, to appoint an officer to take and keep possession of the property

(2) This section shall not apply when the deceased is a Hindu, Mahammadan Buddhist Sikh or Jama or an excompted person nor shall it apply to any part of the property of an Indian Christian who has died intestate

Sub-section (2) incorporates the provisions of section 3 of Act VII of 1901 and as the provision is not incorporated in the Act of 1881 it excludes the persons to whom that Act relates from the purview of the clause —Notes on Clauses

314 Although this section has not been incorporated in the Probate and Administration Act the High Court has power to appoint a receiver in a testamentary suit under the general provisions of the C P Code—Yeshuant y Shankar 17 Bom 388

If in the case of an executor or administrator any misconduct waste or improper disposition of the assets is shown, or if he is out of the jurisdiction,

the Chancery Division will instantly interfere and appoint a receiver—Anonymous 2 Ves 5 (per Sir W Grant) Middleton v Dodswell 13 Ves 268 But the administration is not to be taken out of the hands of the executor upon slight grounds as for instance merely on the ground of his property—Middleton v Dodswell soura

In the case of Mahomedans the rule of the Court of Chancery that a receiver will not be appointed unless gross misconduct of the executor is shown is not applicable and a receiver will be appointed in a proper case even though no misconduct of the executor is alleged—Hafixbar y Kaza Abdul 19 Bont. 83 (85)

A District Judge has power of interference under this section in respect of the entire property of the deceased person even though some part of the property is situate outside his jurisdiction even outside the province altogether —Rego v Rego 29 NLR 238 ALR 1933 Nag 173 (176). If the section is interpreted in a narrow sense so as to restrict the District Judges powers of protection to only such part of the property as is situate within his jurisdiction the very object of this section may be defeated. It would necessitate a person interested in the deceased's property making several applications to the District Judges within whose jurisdictions various parts of the property are situated Such a procedure would obviously run counter to the scheme of the law—Tbid

The Judge exercising his powers under this section has no authority to investigate the claimant's title and his finding as to title will not be conclusively binding on the party affected—Rego v Rego supra. In the exercise of the powers under this section the Judge can pass any order which he considers most effective in order to protect the property. He can not only appoint an officer to take and keep possession of the property but can appoint the person who is already in possession of the property to keep such possession until administration is granted—Rego v Rego supra

The Judges power to interfere for the protection given by this section is independent of any application made for the grant of probate or letters of administration. Therefore the dismissal of an application for letters for want of prosecution does not affect the validity of the order made under this section. This order survives until a probate is granted or an administrator is constituted.

-Rego v Rego supra

When probate of the will or letters of administration Section 240
When probate or administration may be granted by District Judge under Section 56
Judge or granted by a District Judge under Section 56
the seal of his Court, if it appears by a Act V of petition, verified as heremafter provided, of the person

applying for the same that the testator or intestate, as the case may be, at the time of his decease, had a fixed place of bode, or any property, moveable or immoveable, within the jurisdiction of the Judge

315 Jurisdiction —A District Judge has jurisdiction to grant probate of a will executed out of British India by a person who is not a British subject if the testator had at the time of his death, moveable and immovesable property within the jurisdiction of the Judge. The provisions of this section are general and quite irrespective of the place where the will was executed or of the nationality of the testator—Blauroe v Lakkhimibar 20 Bom. 607 (609) Where a will vas executed in Bombay devising immoveable property in Thana the

District Judge of Thana had jurisdiction to grant probate of the will-Ravji v Vishnu 9 Bom 241 (243) It is not necessary that all the property of the deceased should be situated within the jurisdiction of the District Judge in whose Court the probate is asked for The Judge can grant probate if a part only of the estate of the deceased is situate within his jurisdiction-Lal Singh v Aishen Devi AIR 1929 Lah 72 (73) 110 IC 391 If some prop rty of the deceased is situate in a Native State the Judge can grant probate only with respect to the property in British India but not with respect to property in that State-Ibid

The expression fixed place of abode does not mean permanent residence at one place in a man's life (because no one in the world can be said to have a permanent place of abode) but residence for a considerably long time. So where the deceased had been stationed as a Railway Guard for 20 years at a place where he occupied quarters in the Railway lines he must be deemed to have had a fixed abode at the place in spite of the fact that he was liable to be transferred-Govind v Angnt 19 NLR 54 AIR 1923 Nag 145 71 IC So the Court has jurisdiction to grant probate or administration if the deceased resided within its jurisdiction at the time of his death although the residence was not of a permanent nature but he had come there for the purpose of medical treatment so that it was uncertain how long that residence might be -In the goods of Mohendra 5 CWN 377 (381) Sobhag Rans v Lado Rans 11 Lah L J 11 116 I C 305 A I R 1929 Lah 282 (283)

Where the deceased has left some moveable property within the Judge's jurisdiction and all the witnesses to the will reside within the jurisdiction the Judge has power to entertain an application for probate-Gound v Anant supra A deposit of money is moveable property and therefore where the deceased had deposited a sum of money in a Bank within the jurisdiction of the Court at was held that that Court had authority to grant letters of adminis tration-Sobhag Rans v Lado Rans supra But a District Judge cannot grant letters of administration if the deceased had not at the time of his death a fixed place of abode or any property within his district. The mere fact that an administration suit was going on in that district was not sufficient to give purisdiction to the Judge of that district-Fardung v Navarbar 17 Bom. 689 (690) Where the decea ed died without the jurisdiction of the Court and left no property at any place within its jurisdiction except some earthen pots and other trifling articles the District Judge refused to grant administration-Bai Mancha v Bas Ganga 1 Bom LR 666

The High Court (which under sec. 300 has concurrent surreduction with the District Judge) has no jurisdiction to grant probate of the will of a testator who did not live in the presidency nor left any goods or effects within the limits of the presidency-In the matter of Rose Learmouth 24 Mad 120 (121)

271

When the application is made to the Judge of a

Disposal of application made to Judge of district in which deceased had no fixed abode

district in which the deceased had no fixed abode at the time of his death, it shall be in the discretion of the Judge to refuse the application, if in his judg-

ment it could be disposed of more justly or conveniently in another district, or where the application is for letters of administration, to grant them absolutely, or limited to the property within his own jurisdiction

Section 241 Act \ of 1865 Section 57 Act V of 1881

316 Where between Courts of different districts in British India there is question as to which of such Courts can most justly or conveniently grant probate the Judge has a discretion to refer the applicant to the more convenient. Court but where there is no Court of concurrent jurisdiction in British India to which the applicant can apply for probate the Judge is vested with no such discretion. Therefore where the testator was a subject of Baroda State and the will was executed at Baroda but he left immoveable property situate in the distinct of Belgaum where the petition for probate was made held that the District Judge of Belgaum must entertain the application and has no discretion to refer the applicant to the Baroda Court as Baroda is not a district in British India—Bharana v Lakshimbar 20 Bom 607 (609 6100).

If the property within the jurisdiction of the District Judse be of a very trifling nature the Judge may in his discretion under this section refuse the application if in his opinion it can be riore conveniently disposed of in another district—Bai Mancha v Bai Ganga 1 Bom L R 666 But in such a case the Judge may in his discretion elect to entertain the application and go on with the proceeding. The matter is left with the discretion of the Judge and if he chooses to act either way his action cannot be interfered with by the High Court either in appeal or in revision—Bhupendra v Ashtabhuja 1932 A L J 418 139 I C 166 A IR AN 1379 (381)

The applicant for probate is dominus litts and his choice should be given effect to unless there are sufficient grounds made out to show as to why the proceedings should not be held at the District Court. The fact that the deceased lived in Calcutta or that the major portion of his property is situated in Calcutta is no ground for refusing to entertain an application for probate by the District Judge of Alipur (24 Parganas) which is only 3 or 4 miles distant from the Calcutta High Court—Ananga Mohan v. Balai Chand. 33 CL J. 385 63 IC 523 (524)

Probate and letters of administration may be granted by Delegate

Probate and letters of administration may, upon Section 241 application for that purpose to any A Act Not may be District Delegate, be granted by him Section 58 legate in any case in which there is no con-Act Vot tention, if it appears by petition, veri-Section 3

tention, if it appears by petition, veri-Section 3 field as hereinafter provided, that the testator or intestate, Act VI of as the case may be, at the time of his death had a fixed place of abode within the jurisdiction of such Delegate

Conclusiveness of probate or letters of ad

Probate or letters of administration shall have Section 242
so of pro
moveable or immioveble, of the deceased Section 59
throughout the province in which the Act V of

same is or are granted, and shall be conclusive, as to the representative title, against all debtors of the deceased, and all persons holding property which belongs to him, and shall afford full indemnity to all debtors paying their debts and all persons delivering up such property to the person to whom such probate or letters of administration have been granted

S-44

Sections 2 (2) and 3 (1) Act VIII of 1903

Provided that probates and letters of administration granted—

- (a) by a High Court, or
- (b) by a District Judge, where the deceased at the time of his death had a fixed place of abode situate within the jurisdiction of such Judge, and such Judge certifies that the value of the property and estate affected beyond the limits of the province does not exceed ten thousand rupces.

shall unless other wise directed by the grant, have like effect throughout the whole of British India

The proviso to this section shall apply in British India after the separation of Burma and Aden from India to probates and letters of administration granted in Burma and Aden before the date of the separation, or after that date in proceedings which were pending at that date

Note —The words in statics at the end of the section have been inserted by the Government of India (Adaptation of Indian Laws) Order 1937

317 Scope of section —Before the addition of the proviso (by Act AIII of 1875) the result of this section was that an ordinary grant of letters of administration by the High Court did not operate beyond the limits of the Province within which that Court exercised its jurisdiction—In the goods of Duncan 1 BLR OC 3 In re Neketical 1 BLR OC 19

The effect of the proviso is to make the probate in certain cases operative throughout British India But in case of persons who are not governed by the Succession Act (e.g. Cutch Memons who are to be treated as Mahomedans) probate cannot be granted to take effect throughout India—In re Han Ismail 6 Bom 452 (460)

This Act applies to Zanzibar which is a District in the Presidency of Bombay and under this section probate granted by the Consular Court in Zanzibar has effect over the property and estates of the deceased in Bombay—Macled v Consul General Zan ibar 8 Bom.L.R. 725

Province —The word Province in sec 273 must be taken from the destination in sec 2 (g) of the same Act which says that Province includes any division of British India having a Court of the last resort. Sections 270 and 271 give a District Judge jurisdiction to exercise powers of granting letters of administration if there is any property within the area of his judgeship. Hence where the property bequeathed which is valued at several lakhs is almost all in Outh and a small portion of the property valued at Rs. 15 only exists in the Judg-eship of Benares and the deceased had no fixed abode within the jurisdiction of the District Judge of Benares has power to entertain an application for the issue of letters of administration and it cannot be said that it hould have been necessarily dismissed for want of jurisdiction—Debs Bakhsh v Ashthbuya Ravan 1937 A W R 767.

This section does not contemplate cases in which some of the property of the decreased is situated in a Native State—Lal Singh v. Aishen Det. 110 I C 391 A.I R. 1929 Lab 72 (73)

Conclusiveness of probate -The action of a Probate Court of competent jurisdiction when it admits a will to probate is in the nature of a proceeding in rem and so long the order remains in force it is conclusive as to the due execution and validity of the will not only upon all the parties who may be before the Court but also upon all other persons whatever in all proceedings arising out of the will or claims under or connected therewith-Saroda v Gobind 12 CLJ 91 6 IC 912 (916) Narbheram v Jevallabh 35 Bom LR 998 AIR 1933 Bom 469 (474) 147 IC 362 The title conferred upon every executor who has obtained probate is obviously convenient as tending to facilitate the administration of the estate of the deceased and the adjustment or the rights of all parties connected with it-Kurrutul ain v Nuzbatud dowla 33 Cal 116 (128) (PC) This section affirms and enacts the conclusiveness of a grant of probate or administration as the representative title merely but it does not declare the probate of a will to be conclusive evidence of the validity of the contents of the will itself-In re Bhobo Soondure 6 Cal 460 (per Field But where the executor took out probate of a will by which certain properties had been dedicated to an idol and he accepted the position that the properties had been properly dedicated for devasheba any person claiming through the executor cannot raise any question as to the validity of the dispositions made under the vill-Dayamoys v Sankar 42 CLJ 30 AIR 1926 Cal 417 (419) 87 IC 159

While this section enacts that the grant of a probate is conclusive proof of the title of the executors and of the genuineness of the will admitted to probate it by no means follows that a similar consequence in the opposite sense must flow from the refusal of the Court to grant probate. A refusal to grant probate must not necessarily lead to the conclusion that the will propounded is not the genuine will of the testator Such refusal (provided that it is not a refusal on the ments se not a refusal on the ground of invalidity of the will) does not bar a subsequent suit by the executors for a declaration that the property of the deceased belonged to them and for an injunction to restrain interference in their enjoyment of it-Ganesh v Ram Chandra 21 Born 563

This section affords protection to debtors making bona fide payments to an executor or administrator before revocation of the grant. Even though letters of administration have been obtained by fraud still so long as the grant remains unrevoked the grantee though a rogue and an imposter is to all intents and purposes the administrator. He and he alone represents the estate of the deceased His receipts are valid discharges for all moneys received by him as administrator-Debendra v Administrator General 35 Cal 955 (959) (PC) affirming Debendra v Administrator General 33 Cal 713

(1) Where probate or letters of administration Section 242 has or have been granted by a High A Act X of

Transmission to High Courts of certificate of grants under proviso to

Court or District Judge with the effect Section 60 referred to in the proviso to section Act V of

section 273 273, the High Court or District Judge Sections 2 shall send a certificate thereof to the following Courts, (3) and 3 (2) Act (a) when the grant has been made by a High Court, 1903

to each of the other High Courts,

(b) when the grant has been made by a District

Judge, to the High Court to which such Dis trict Judge is subordinate and to each of the other High Courts

- (2) Every certificate referred to in sub-section (1) shall be made as nearly as cu-cumstances admit in the form set forth in Schedule IV, and such certificate shall be filed by the High Court receiving the same
- (3) Where any portion of the assets has been stated by the petitioner, as heremafter provided in sections 276 and 278, to be situate within the jurisdiction of a District Judge in another province, the Court required to send the certificate referred to in sub-section (1) shall send a copy thereof to such District Judge, and such copy shall be filed by the District Judge receiving the same

Section 243 Act X of 1865 Section 61 Act V of 1881 275 The application for probate or letters of administration of made and verified in the

Conclusiveness of ap plication for probate or administration if proper ly made and verified tration, if made and verified in the manner heremafter provided, shall be conclusive for the purpose of authorising the grant of probate or administra-

tion, and no such grant shall be impeached by reason only that the testator or intestate had no fived place of abode or no property within the district at the time of his death, unless by a proceeding to revoke the grant if obtained by a fraud upon the Court

319 This section is enacted for purisdictional and not for fiscal purposes is enacted for the purpose of authorising the grant of administration and rendering it conclusive even though there might be incorrect statements or omissions in the application upon which the grant is issued and it has no reference to the valuation of the estate for the purpose of levying a Court fee upon it—In the goods of Sassoon 21 Bom 673 (676)

Section 244 Act X of 1865 Section 62 Act V of 1881 276 (1) Application for probate or for letters of administration, with the will annexed, shall be made by a petition distinctly written in Γinglish or in the language in ordinary use in proceedings before the Court in which the application is made with the will or, in the cases mentioned in sections 237, 238, and 239 a copy draft or statement of the contents

(a) the time of the testator's death,

(b) that the writing innexed is his last will and testament,

(c) that it was duly executed,

thereof, annexed and stating-

(d) the amount of assets which are likely to come to Section 3 Act VI of the petitioner's hands, and

(c) when the application is for probate, that the petitioner is the executor named in the will

(2) In addition to these particulars, the petition shall

further state.-

(a) when the application is to the District Judge, that the deceased at the time of his death had a fixed place of abode, or had some property, situate within the jurisdiction of the Judge, and

(b) when the application is to a District Delegate, Section 4 that the deceased at the time of his death had 1881 a fixed place of abode within the jurisdiction

of such Delegate

(3) Where the application is to the District Judge and Sections 2 any portion of the assets likely to come to the petitioner's (3) Act hands is situate in another province, the petition shall further 1903 state the amount of such assets in each province and the District Judges within whose jurisdiction such assets are situate

The provisions of section 62 of the Act of 1881 seem to be complete and they have been adopted mutatis mutandis in this clause -Notes on Clause

Oral will -This section applies to a written will and not to an But if an oral will was made before this Act (se the present Succession Act of 1925) came into force and an application for probate was made shortly before the coming into operation of this Act the probate proceedings would be governed by this Act and a probate can be granted of the oral will (se of the substance of the oral will) This Act lays down a rule of procedure only and not of substantine law and therefore would not make the oral will invalid nor would refuse probate of it-Pitam Lal v Kalla 53 All 687 (FB) 1931 ALJ 711 AIR 1931 All 489 (490)

'Duly executed' -The term duly executed in sub-sec (1) clause (c) does not mean merely the fact of execution by the testator but means proof of execution which carries with it a conviction that the testator knew and approved of the contents of the instrument. This involves the proposition that he was a free and capable testator since knowledge implies his possession of the capacity without which he could not know the contents of the will and approval cannot be real and complete without a free exercise of the will-Woomesh v Rashmohini 21 Cal 279 See also notes to sec 59 under heading Presumption and Burden of proof

But it is not the function of the Court to go into the question of the validity of the will with reference to the nature of the property disposed of by it That matter must be left to the parties to be contested in separate proceedings. The only function of the Probate Court is to determine whether the will was duly executed by the deceased while he was in possession of his senses and had a valid disposing mind—Bua Ditta v Devi Ditta 132 IC 527 AIR 1931 Lah 130 (131 132)

In proceedings under this Act when probate of a will is sought the Court is bound to grant probate unless it finds that the will was not executed by the testator or that he was not in a state of mind competent to exercise his testa mentary powers or that the will was not the testator's voluntary act. The Court has no concern with the question whether the will if proved will be effectual or valid or whether it can affect certain parts of the property with which it purports to deal. The mere fact that a will if proved might in view of a previous decree of a Civil Court prove ineffectual is no ground for refusing to grant probate nor is the Court competent to consider the question whether the will is a valid disposition by the testator—Inder Naram v. Onkar Lal. 20 PR 1912 10 IC 130 (131)

321 Amount of assets —The term assets means and includes property of a deceased person chargeable with and applicable to the payment of his debts and legacies. It would therefore include immoveable property—In the goods of Courjon 25 Cal 65 (73). The petitioner has to state all the assets which are likely to come into his hands and not merely such part of them as he chooses to name—Auphpayammal v. Ammani 22 Mad 345 (346). The object of the rule requiring the executor to state in his application for probate the amount of assets which are likely to come into his hands is to furnish a basis for testing the accuracy of the subsequent inventory and accounts—In re E ekicl Abraham 22 Bom. 139 (152). In an application for 1 iters of administration with the will annexed the petitioner is required to state only the particular item of property in respect of which he makes the application and need not give an inventory of the climber property of the testator—Gurbachan v. Satuant 28 PLR 6.08 7 Lah L.J. 288 1925 Lah 493 90 IC 6.88

An application for probate should not be refused on the ground that there are no assets remaining to be administered. Where a will has been propounded and proved the Court should grant probate even though it appears that there are no dobts due to or by the testator and the legatess have been in possession in accordance with the directions of the will for a long time—futuari V Arishna dhone 21 CW N 1129 (1130) 42 1C 933. But an application for letters of administration stands on a different footing. In case of such applications, it is the duty of the Court before granting the littlers to consider whether there is any state left to be administered—Lalit Chandra v. Baikentha 14 CW-N 163 (461 463) 5 1C 33. In the coast of Neuroline 3 CW N 533.

Clause (e) —Where a member of a firm has been appointed executor without specification of name any person who applies for probate must prove that he was a number of the firm both at the time of the vall and at the time of the te tator's death—In the goods of George Vash 29 C.W.N 373 (374), MIR 1923 Cal 600 94 IC 591

Sub-section (\*) (a)—Property situate unlim the jurisdation of the Judge — In an application for probate it is sufficient for the purpose of giving jurisdation under this section, that the property adeged by the patitioner to have been state within the jurisdation of the Judge Joodd have been in the pose-sion of the trainer at the time of 1 is death and it is not for the Court to tomoder whether the fulle under which the testator held the property was good or bad— Aum Bakadort & Auriga Poert & C.E.R. 1983.

322. Miscellaneous —Under this section an applicant is under no ob-gation to stale the names of the family or other relaines of the decrated—

Ralph v Hale 7 PR 1902 These are required to be stated in an application for letters of administration (sec 278) But though this section unlike sec 278 does not specifically require that the names and residences of the family or other relatives of the deceased should be stated in the application for probate and consequently the omission to furnish such information in the application does not affect the validity of the proceedings still if the application for probate contains false statements as to the relatives of the deceased (e.g. if the applicant states that the deceased I it no other near relatives besides the widow whereas the deceased left two nephews) and consequently no special citation is issued to the near relatives the application and the proceeding to obtain the probate are defective in substance and the probate is hable to be revoked-Syama Charan v Prajulla 19 CWN 882 (884) 30 IC 161 21 CLJ 557 Charubala v Menala Sundan 36 CWN 1010 (1011)

Although this section requires that the application must be accompanied with the will still if at the time of the application the will is not in the appli cant's possession and he says that it is in the possession of some other named person and prays that the Judge should direct that person to produce it and later on the applicant obtains it from that person and produces it in Court the requirements of this section are sufficiently complied with-Bua Ditta v Deis Ditta AIR 1931 Lah 130 (132) IC 527

When an application for probate has been made under section 276 of a will of which a copy has been obtained the true one being deposited in a foreign Court and from the petition it is found that the application should have been for letters of administration under section 228 Held that the Court could grant letters of administration with a copy of the will annexed or at least could allow the petition to be amended-Ram Lal v Ghanan Das 178 IC 224 AIR 1938 Lah 349

In what cases transla

tion of will to be annexed to petition

Venfication of transla tion by person other than Court translator

In cases wherein the will, copy or draft is written Section 245 in any language other than English or Act X of than that in ordinary use in proceedings Section 63 before the Court, there shall be a trans Act V of lation thereof annexed to the petition

by a translator of the Court, if the language be one for which a translator

is appointed or, if the will, copy or draft is in any other language, then by any person competent to translate the same, in which case such translation shall be verified by that person in the following manner, namely -

"I (AB) do declare that I read and perfectly understand the language and character of the original. and that the above is a true and accurate trans-

lation thereof "

(1) Application for letters of administration Section 246 Petition for letters of shall be made by petition distinctly Act X of administration written as aforesaid and stating-

Section 64 Act V of

(a) the time and place of the deceased's death.

(b) the family or other relatives of the deceased, and their respective residences,

(c) the right in which the petitioner claims,

- (d) the amount of assets which are likely to come to the petitioner's hands,
- (c) when the application is to the District Judge, that the deceased at the time of his death had a fixed place of abode, or had some property, situate within the jurisdiction of the Judge, and
- (f) when the application is to District Delegate, that the deceased at the time of his death had a fixed place of abode within the jurisdiction of such Delegate
- (2) Where the application is to the District Judge and any portion of the assets likely to come to the petitioner's hinds is situate in another province, the petition shall further state the amount of such assets in each province and the District Judges within whose jurisdiction such assets are situate.

Note —In respect of clauses (e) and (f) the wording of section 64 of Act V of 1881 has been followed and not that of sec 246 of Act X of 1865 in order to assimilate the wording of this section to that of sec 276

323 Assets -bee Note 321 under section 276 Thi section merely requires that an application for letters of administration should specify the amount of assets that are likely to come to the petitioner's hands but it is not necessary for the Court of Probate to decide what a sets are likely to come into the hands of the petitioner for the purposes of administration but it is the duty of such Court in granting letters of administration to consider whether there is any estate whatever to be administered. Where no estate remained to be administered and the object of the application was not to administer the effects of the deceased but really to obtain a declaration of heirship so as to fortify the successful party in any regular suit that might be instituted held that no grant should be made-Laht Chandra v Baskuntha 14 CWN 463 (464 465) 5 IC 395 In the goods of Nurshing 3 CWN 635 But in the case of an application for probate no such consideration an es and the Court must grant probate on the application of the executor even though it should appear that there are no debts due to or by the testator and the legatees have been in possession for a long time according to the direction of the will-Aduant v Arishnadhone 21 CWN 1129 (1139) 12 IC 933

Where after the petitioner had obtained letters of administration from the District Court it was devocated that the deceased left assets outside the jurisdiction of that Court and it therefore became advisable to obtain letters of administration from the High Court the proper course was to apply to the District Judge to revoke the letters granted by him and then to apply to the High Court for a new grant of administration—In the goods of De Salia 25 All 335

Section 4 Act VI of 1881

Sections 2 (4) and 3 (3) Act VIII of 1903 In an application for letters the petitioner is required to state only the particular item of property in respect of which he is making the application it is not necessary for him to give an inventory of the entire property of the deceased—Gurbachan v Satuant 26 P.L.R. 608 A.I.R. 1925 Lah 493 7 Lah L.J. 288 90 I.C. 620

Where the deceased and the applicant were members of a joint Hindu Mitakshara family the latter is not competent to apply for letters of administration —Gopalastian i v Mecnalshi 7 Rang 39 A I R 1929 Rang 99 (102) 115 IC 903; Ramagiri v Goundamina 3 Burl J 116 A I R 1924 Rang 329 (330), Utlam Den i v Dina Nath 56 PR 1919 51 IC 651 The contrary remarks in the case of In re Dasu Manarala 33 Mad 93 (97) are merely obter and the case is really one relating to court fees payable for letters of administration and not relating to grant of letters. So page 243 are

279 (1) Every person applying to any of the Courts Section 28 Addition to statement in petition et for probate of letters of administration in certain cases. Shall state in his petition, in addition to the matters respect of the letters of section 278 and the section 2 shall state in his petition, in addition to the matters respect of Act of the letters of the letters of Section 278 and section 278, and section 278 and section 278, that to the 1933 best of his belief no application has been made to any other

best of his belief no application has been made to any other Court for a probate of the same will or for letters of administration of the same estate, intended to have such effect as last aforesaid,

or, where any such application has been made, the Court

or, where any such application has been made, the Court to which it was made, the person or persons by whom it was made and the proceedings (if any) had thereon

- (2) The Court to which any such application is made under the proviso to section 273, may, if it thinks fit, reject the same
- 280 The petition for probate or letters of administra- Section 247, Petition for probate etc. to be signed and stensible to the petitioner and his pleader, if any, Section 66 and shall be verified by the petitioner Act Voi in the following manner, namely—
  - "I (AB), the petitioner in the above petition, declare that what is stated therein is true to the best of my information and belief"
- 324 A petition by the Administrator General for letters of administration is sufficiently verified by his signature only—In the goods of McComiskey 20 Cal 879 In the goods of Atdall 26 Cal 404 (406) 3 CWN 298

(b) the family or other relatives of the deceased, and their respective residences.

(c) the right in which the petitioner claims,

- (d) the amount of assets which are likely to come to the petitioner's hands,
- (e) when the application is to the District Judge, that the deceased at the time of his death had a fixed place of abode, or had some property, situate within the jurisdiction of the Judge, and
- (f) when the application is to District Delegate, that the deceased at the time of his death had a fixed place of abode within the jurisdiction of such Delegate

(2) Where the application is to the District Judge and any portion of the assets likely to come to the petitioner's hands is situate in another province, the petition shall further state the amount of such assets in each province and the District Judges within whose jurisdiction such assets are situate

Note —In respect of clauses (e) and (f) the wording of section 64 of Act V of 1881 has been followed and not that of sec 246 of Act X of 1865 in order to assimilate the wording of this section to that of sec 276

323 Assets -See Note 321 under section 276 Thi section merely requires that an application for letters of administration should specify the amount of assets that are likely to come to the petitioner's hands but it is not necessary for the Court of Probate to decide what a sets are likely to come into the hands of the petitioner for the purposes of administration, but it is the duty of such Court in granting letters of administration to consider whether there is any estate whatever to be administered. Where no estate remained to be administered and the object of the application was not to administer the effects of the deceased but really to obtain a declaration of heirship so as to fortify the successful party in any regular suit that might be instituted held that no grant should be made-Lalit Chandra v Baskuntha 14 CWN 463 (464 465) 5 IC 395 In the goods of Nurshing 3 C W N 635. But in the case of an application for probate no such consideration arises and the Court must grant probate on the application of the executor even though it should appear that there are no debts due to or by the testator and the legatees have been in possession for a long time according to the direction of the will-Adulat v Arishnadhone 21 CWN 1129 (1139) 12 IC 933

Where after the petitioner had obtained letters of administration from the District Court it was discovered that the deceased left assets outside the jurisdiction of that Court and it therefore became advisable to obtain letters of administration from the High Court the proper course was to apply to the District Judge to revoke the letters granted by him and then to apply to the High Court for a new grant of administration—In the goods of De Silva 25 All 335

Section 4 Act VI of 1881

Sections 2 (4) and 3 (3) Act VIII of 1903 In an application for letters the petitioner is required to state only the particular item of property in respect of which he is making the application it is not necessary for him to give an inventory of the entire property of the deceased—Gurbachan v Satuant 26 Pl.R. 608 AIR 1925 Lah 493 7 Lah L.J. 288 90 I.C. 620

Where the deceased and the applicant were members of a joint Hindu Mitakshara family, the latter is not competent to apply for letters of administration — Gopalasuami v Mechalshi 7 Rang 39 AIR 1829 Rang 99 (102) 115 IC 905 Ramagin v Govindamina 3 Burl J 116 AIR 1824 Rang 329 (330) Ultan Devi v Dina Nath 56 PR 1919 51 IC 651 The contrary remarks in the case of In re Dasu Manarala 33 Mad 93 (97) are merely obiter and the case is really one relating to court fees payable for letters of administration and not relating to grant of letters. See page 243 ante

Addition to statement in petition etc for probate of a will or letters of Section 26 bate or letters of administration in certain cases shall state in his petition, in addition to the matters respectively required by section 276 and section 278, that to the 1933

tively required by section 276 and section 278, that to the best of his belief no application has been made to any other Court for a probate of the same will or for letters of administration of the same estate, intended to have such effect as last aforesaid,

or, where any such application has been made, the Court to which it was made, the person or persons by whom it was made and the proceedings (if any) had thereon

- (2) The Court to which any such application is made under the proviso to section 273, may, if it thinks fit, reject the same
- 280 The petition for probate or letters of administra- Section 247, Petition for probate etc. to be signed and shall in all cases be subscribed by Act X of the petitioner and his pleader, if any, Section 66 and shall be verified by the petitioner Act V of in the following manner, namely
  - "I (AB), the petitioner in the above petition, declare that what is stated therein is true to the best of my information and belief"
- 324 A petition by the Administrator General for letters of administration is sufficiently verified by his signature only—In the goods of McComiskey 20 Cal. 879 In the goods of Atdall 26 Cal 404 (406) 3 CWN 298

Section 248 Act X of 1865 Section 67 Act V of 1881 Venification of petition for probate by one will mess to will when procurable) in the manner or to the effect currible) in the manner or to the effect.

following, namely

"I ((D), one of the witnesses to the last will and testiment of the testator mentioned in the above petition, decline that I was present and saw the said testator affix his signature (or mark) thereto (or that the said testator acknowledged the writing annexed to the above petition to be his last will and testament in my presence)"

325 In an English case where no attesting witness could be found the affidaxt of an attesting witness made in a previous proceeding eight years before was allowed to be read as evidence of execution and of testamentary capacity—Gornall v Mason 12 PD 142 Similar practice may be followed in India

where none of the attesting witnesses is found.

This section requires verification if the witness is procurable. This shows that the provisions of this section as to verification are directory and not mandatory and therefore the omission does not invalidate the proceedings—Ramsunch v. Mutriba 68 10 C 940 A IR 1923 Nag 41 (42).

Section 249 Act X of 1865 Section 68 Act V of 1881 282 If any petition or declaration which is hereby required to be verified contains any averment in petition or declaration which is hereby required to be verified contains any averment which the person making the verification knows or believes to be false, such person shall be deemed to have committed an

offence under section 193 of the Indian Penal Code

283 (1) In all cases the District Judge or District

Section 250 Act X of 1865 Section 69 Act V of 1881 Section 9 Act VI of 1881

Judge

Powers of District Delegate may if he thinks pro-

 (a) examine the petitioner in person, upon oath,
 (b) require further evidence of the due execution of the will or the right of the petitioner to the letters of administration, as the case may be,

(c) issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate or letters of administration

(2) The citation shall be fixed up in some conspicuous part of the Court-house, and also in the office of the Collector of the district, and otherwise published or made known in such manner as the Judge or District Delegate issuing the same may direct

- (3) Where any portion of the assets has been stated by the petitioner to be situate within the jurisdiction of a Act VIII of District Judge in another province, the District Judge issuing 1903 the same shall cause a copy of the citation to be sent to such other District Judge, who shall publish the same in the same manner as if it were a citation issued by himself, and shall certify such publication to the District Judge who issued the citation
- Clause (a), Evidence of execution of will -No grant of probate can be made unless a vill has been proved in accordance with law and masmuch as a grant of probate operates as a judgment in rem the Court must be satisfied that the will has been duly executed and attested-Ameer Chand v Mohanund 6 CLJ 453 Aufpayammal v Ammani 22 Mad 345 (346) The propounder of a will should prove to the satisfaction of the Court beyond all possible doubt that the will was executed by the alleged testator that it was executed according to law and that the testator at the time of execution was in a fit state of mind and body to execute the will and to fully appreciate what he was doing as to the disposition of the property-Padma Prisa v Dharma Das 15 CWN 728 (729) 10 IC 965 Duijendra v Goloke Nath 19 CWN 747 (751) 28 IC 574 In all cases in which an application is made for probate or letters of administration it lies upon the applicant to produce all the evidence which the circumstances of the case indicate as proper and necessary to prove the execution of the will in respect of which the Court is asked to make a grant-Tara Chand v Deb Nath 10 CLR 550

An application for probate being one that from its very nature should be speedily disposed of and the grant being irrevocable it follows that if the application is unopposed prima facie proof of the execution of the will is sufficient to warrant the grant of probate—In re Nobodoorga 7 CLR 387

See also notes to sec 59 under heading Presumption and Burden of proof

- 326A Probate, if may be granted on mere consent --- Unless a will is proved in some form no grant of probate can be made merely on the consent of the parties. An agreement or compromise as regards the genuineness and due execution of the will if its effect is to exclude evidence in proof of the will is not lawful and no probate can be granted merely because the caveator consents to the grant. Such an agreement is against public policy as the only issue in a probate proceeding relates to the genuineness and due execution of the will-Ghellabhas Atmaram v Nandaubas 21 Bom 335 Monmohins v Banga Chandra 31 Cal 357 Gours Sankar v Hars Bhabens 41 CWN 848 In the case of Kamal Auman Derry Navendra Nath Mukhern 9 CL J 19 Mr Justice Woodroffe in the judgment delivered by lum refers to the practice in such cases on the Original Side of the High Court and states It is of course obvious that there can be no such thing as an amended probate. Either the will of the testator is proved or it is not. If proved what is proved are the provisions of the will Further there must be proof of the will before probate is granted. The mere consent of parties without evidence in support of the will and which satisfies the Court of its due execution is insufficient
- 326B Probability, how far a matter for consideration— Probability is not the main thing to be considered in connection with the question as to whether probate should or hould not be granted. The Court has to be

Satisfied as to whether the will was as a matter of fact executed and if so executed by a free capable and willing testator—Garib Shaw v Patra Dassi 60 CL J 337

326C Locus stands of objector to contest the proceeding— The question of locus stands of the objector to contest the proceedings is an issue which ought to be tried and determined as a preliminary proceeding— Garib Shau v Patra Dass 66 CL J 337

327 Clause (c)—Citation —A testament may be proved in two ways either in common form or by form of law the latter mode is also called the solenn form and sometimes proving per testes. A will is proved in common form when the executor presents it before the Judge and in the absence of and without citing the porties interested produces witnesses to prove the same and the witnesses having testified by their oaths that the testament exhibited is the true whole and last will and testament of the deceased the Judge there upon and sometimes upon less proof does aimex his probate and seal thereto When a will is to be proved in solemn form it is requirste that such persons as have interest should be made parties to the action or should be cited to be present at the probation and approbation of the testament—William on Executors 11th Edn pp 232 233 235 Phanindre v. Nagendre 39 CLJ 569 ATR 1925 Cal 75 (77) 84 IC 65

But this distinction in English law between proof in common form and proof in solemn form ought not to be introduced into Indian practice. Where there is a positive enactment of the Indian Legislature (set the Indian Succession Act) the proper course is to examine the language of that statute and to ascertain its proper meaning uninfluenced by any consideration derived from the English law upon which it may be founded. The Indian law has departed in many particulars from the rules of English law the ecclesiastical origin of the jurisdiction of Courts in England has been completely discarded and the Indian Legislature has gradually evolved an independent system of its own largely suggested no doubt by English law but also differing much from that law and purporting to be a self contained system—Ramanandi v. Aulauati 7 Pat 221 (PC) 32 CWN 402 408 406) AIR 1928 PC 2 107 IC 14

This section vests the District Judge with full discretion as to the issue of citations which should be exercised with proper care. In every case in which probate of a Hindu will is asked a special citation ought to be seried upon those persons whose interests are directly affected by the will. The practice of a mere general citation in all cases is one which may tend to encourage fraud and the fabrication and propounding of forged wills-In re Hurro Lal 8 Cal 570 Although it is quite true that this section which provides for the issue of citations does not render it obligatory on the Court to issue any special citation but mercly declared that it shall be lawful for the Court to do so yet it is not only desirable but necessary in the ends of justice that this power should be exercised when it appears that some of the heirs whose interests are affected by the will are minors-Rebells v Rebells 2 CWN 100 (104 105) Where a will is propounded which alters the devolution of property the District Judge should in the exercise of the discretion vested in him by this section direct special citations to persons whose rights are immediately affected by the will-Syana Charan v Prafulla 19 CWN 882 (884) 21 CLJ 557 30 IC 161

Although sec 276 (unlike sec 278) does not require that a petition for probate should contain the names of the relatives of the testator which are required in a petition for letters of administration still sec 283 lays down that it shall the lawful for the District Judge to issue citations on all persons claiming to have an interest in the estate of the deceased whether in proceedings for probate or for letters of administration. And Illustration (ii) of section 283 shows that a grant made without citing parties who ought to have been cited is fit to be revoked. Consequently where the application for probate contained a false statement as to the relations of the deceased is where it mentioned some of the relation and omitted to mention the others and citations were not issued to the latter the grant must be revoked—Syama Charant y Profulla supra Charylala y Minaka Sundam 36 C.W.N. 1010 (1011 1012)

If the person to be cited is a minor the citation should issue upon the guardian of the minor-In ve Amvita Lal 27 Cal 350 If the natural guardian (eg motter) of the infant is also a minor the prop r course is to have a guardian ad litem appointed for him-Dwijendra v Goloke Nath 19 CWN 747 (750) 28 IC 574 Azimunnissa v Sirdar Ali 29 Bom.LR 434 AIR 1927 Bom 387 Akhilesuari v Haricharan 40 CI J 297 AIR 1925 Cal 223 (224) see also Rebells v Rebells 2 CWN 100, Shoroshibala v Anandamoyee 12 CWN 6 and Brindaban v Sureshuar 10 CLJ 263 3 IC 178 (185) But if the circumstances of the case are such that the appointment of a guardian ad litem would not afford any protection to the infant (eg if the executors appointed by the will are per one whose interests are adverse to that of the infant legatee and the guardian ad litem who is a stranger to the family would hardly be able to make an adequate defence) the appointment of a guardian ad litem is of no use. In such a case, the nunor when he comes of age can make an application for revocation of the probate obtained by the executors and the Court should revoke the grant and then call upon the executors to prove the will-Dunendra , Goloke Nath supra. The issue of a citation on the guardian ad litem is discretionary and not obligatory. Want of citation will not by itself vitiate the probate but in the absence of a citation duly served upon the properly appointed guardian ad litem it would be open to the infant on attaining majority within the period allowed by the Limitation Act to institute proceedings for the revocation of the grant of probate-Azimunnisa v Sirdar Ali Khan 29 Bom. LR 434 AIR 1927 Born. 387 (388) 102 IC 129 In a Calcutta case it has been ruled that the mere appointment of a person as a guardian ad litem followed by the issue of a citation on him is not sufficient. It must be shown that that person assented to the guardianship and took upon himself the burden thereof If that person refused to accept the guardianship and to accept the citation the grant of probate is liable to be revoked. In such case it is unnecesary and uscless to show that the person who was sought to be appointed guardian ad litem was a fit and proper person to be appointed as guardian-Sachindra v Hironmosce 24 C.W.N 538 (540) 59 IC 435

If the guardian of an infant who is served with citation as such does not appear and contest the proceedings it is not necessary that a guardian ad litern should be appointed by the Court and that the will should be proved in the presence of such guardian—Hammabut v. Aunya Mohan 35 CW.N 387 (393) A IR 1931 (3d 173 135 15 C 282

A person acquiring an interest in the estate of a testator subsequently to the testator's death is entitled to a general citation only and not to any special citation —Gopes Chandra v Sylket Loan Co. 41 C.W.Y. 120

See also Note 296 under sec 263

328. Persons claiming to have interest, etc. —Before a prison can be permitted to contest a will the party propounding has a right to call in him to show that he has some interest—Hintfeston v. Tucker (18a1) 2 5 w. E. Tr 596 Rahamatullah v Rama Rau 17 Mad 373 (376) But when two percons oppose a will the one cannot call upon the other to prove his interest—Hinglesion v Tuker supra

Any interest however slight and even the bare possibility of an interest is sufficient to entitle a party to oppose a testamentary paper-Kipping v Ash 1 Robert 270 Brindabon v Sureshwar 10 CL J 263 3 IC 178 (183) Rahamatullah v Rama Rau 17 Mad 373 A bare possibility is sufficient provided it rests on existing facts but the possibility of filling a character which would give the party concerned an interest is not sufficient, but there must be a possibility of having an interest in the result of setting aside the will-Crispin v Doghoni (1860) 2 Sw & Tr 17 Rajamaniham v Farrar 16 LW 455 69 I C 954 A I R 1923 Mad 131 (132) Where citation was issued to the nearest agnatic relation and heir after the death of the testator and such person unjuccessfully contested the application for grant of letters of administration, the sons of such person had no locus stands to claim citation or to oppose the grant because at the time of the testator's death they had no possible chance of suc ceeding to the testator's estate-Bibhuli v Pan Auer 11 PLT 353 125 IC 774 AIR 1930 Pat 488 (491) A person who claims to be the adopted son of the testator cannot contest the will if it is doubtful whether his adoption would be recognised by the law of the deceased's domicile-Rajamanitam v Farrar supra A per on who has some sort of relationship with the deceased (e.g. the testator's grandfather's daughter's grandson) is entitled to oppose the grant of probate of the will propounded by a per on who is a perfect stranger to the family (e.g. testator's sister's husband's brother)-Radha Raman v. Gobal Chandra 24 CWN 316 (320) A person who is entitled to any portion of the estate left by the deceased or a right to claim maintenance from the estate of the deceased has an interest within the meaning of this section. It is not necessary that he should claim through the testator in order to enable him to oppo e the grant of probate of the will of the testator. If a person is likely to suffer by the grant of probate of a forged will or an invalid will he has suffi cient interest to enter a caveat-Hanmantha v Laichamma 19 Mad 960 51 MIL 1 563 98 IC 259 AIR 1926 Mrd 1193 (1196) Any person who can show that he is entitled to maintain a suit in respect of the property over which probate would have effect under sec 273 has sufficient interest to entitle him to file a cay cat and oppose the grant-In to Bhobo Soonday 6 Cal 160 (161) Persons having an interest in the immoveable property of the testator such as a mortgagee of a per on who if the testator had left no will would be entitled to create the mortrage or an attaching creditor of such a person would have su h an interest in the property of the testator as to entitle them to enter caveat and oppose the grant of probate-Ibid Where immediately after a mortgagee attached the mortgaged property and obtained an order for sale the mortgagor's wife applied for probate of the will of the mortgagor's mother the mortgaged property being included in the will held that the mortgagee was entitled to enter a caveat against the grant of probate on the allegation that the will was a forgers and was got up by the applicant to save the property from being sold in execution-Surbomon, ala y Shashibhooshun 10 Cal 413 (416)

An executor who had obtained probate of a former will or a creditor who had a grant of administration can oppose a later will—Dabbs v. Chisman 1 Phillims. 160 no e (e); Boston v. Fox. 4 Sw. E. Tr. 199. In the goods of Tatamors 25 Cal. 553.

A Hirdu reversioner is entitled to special estation and to oppose the grant of probate—18kH saura v. Hancharan 40 CLJ 297 VIR 1925 Cal. 223

(224) 84 IC 689 Khettramoni v Shyama Churn 21 Cal 539, Brindaban v Surishhar 10 CLJ 263 3 IC 178 (184) Although a reversioner under the Hindu law has no present alienable interest in the property left by the deceased still he has substantial interest in the protection or devolution of the estate and as such is entitled to appear and be heard in a probate proceeding—Syama Charan v Prafulla Sundari 19 CWN 882 (884) 21 CLJ 557 30 IC 161 If the immediate reversioner does not contest the next reversioner can enter caveat and contest the probate—Salindra v Saroda Sundari 27 CLJ 320 45 IC 59

A person interested (eg as a legatee) in a former will of the testator which has been admitted but which is alleged to have been revoked by the testator by executing a later will is entitled to contest a proceeding instituted to obtain probate of the later will—Drawpods v. Raj Kumari 22 CWN 564 (565) 45

IC 760 Rahamatullah v Rama Rau 17 Mad 373 (376)

In two recent Madras cases the above rulings have been discussed and it has been pronounced that the caveator mu t possess sufficient interest in the property to support a caveat. In dealing with the question whether the caveator has the necessary intere t the test is does the grant displace any right to which the caveator would otherwise be entitled? If so he has such an interest if not he has not An heir on intestacy has an interest in impeaching the will but for the will he would succeed to the property. A legatee under a previous will has a similar interest for he is interested in establishing the validity of that will and impeaching the validity of the later will which deprives him of the benefit A reversionary heir under the Hindu law has also such an interest But in every case it must be shown that the caveator but for the will would be entitled to a right of which that will deprives him. Where a caveator alleged that the testator purported to dispose of by the will her (caveator s) stridhanam jewels as if they belonged to himself it was held that the interest which the caveator alleged was not sufficient to support the caveat because the executor to whom probate would be granted would not be able to deprive the caveator of her property or to recover any property to which the testator was not entitled Moreover the functions of the Probate Court not being to decide any disputed title (see Note 340 under sec 295) the question of ownership to the property claimed by the caveator would not be gone into by that Court-Southagiammal v Komalang: 54 MLJ 382 107 IC 420 AIR 1928 Mad 803 (805 806) Komalangi v Soubhagiammal 54 Mad 24 59 MLJ 529 AIR, 1931 Mad, 37 (38) The remedy of the caveator is to bring a suit to recover the lewes from the executors-Komalangs v Soubhagiammal supra.

A person has no right to enter caveat simply because he had received a special citation. It is the interest which a man claims in the deceased's extra and not the citation which entitles him to oppose the grant—In the Herryfest, 5 Cal 87 Debendra Surendra 5 PLJ 107 (116) 1 PLT 19 58 ILC 87

See also Ramyad v Ram Bhanu 10 Pat. 812 A.I R. 1932 Pc. 89 190

Persons claiming outside and independently of the will complete each to high an interest in the estate of the testator and consequent. They are no high to challenge the will set up—Bass ab Chancer Gay, Say I CLJ 256 Gopal v. Assutosh 20 IC 312 (Cal)

The person who wishes to come in a critical and size when interest in the estate derived from the decreased by a produce in the control and coloraday to the testator—Puops lab. Ver use in the coloraday in the coloraday is Bomilla 366 Ralph V Hale 2 PLR 36. The coloraday is the coloraday in the

by will the proceedings involve a question of title which the Probate Cour cannot go into and therefore such objector has no locus stands in a proceeding for probate. He should seek his relief in a regular title suit-fanks Saran v Rambal adur 13 PLT 597 110 IC 722 VIR 1932 Pat 343 (314) Ralpl • Hale supra So a person disputing the right of a deceased te tator to dea with certain properties as his own cannot be properly regarded as having such an interest in the estate of the deceated as to entitle him to come in and oppose the grant of probate; his action is rather that of one claiming to have an interest adverse to that of the deceased Abhiran v. Gofal 17 Cal 48 (dissenting from 6 Cal bil): Choton Mahton v Lachmi II PLT 219 AIR 1930 Pat 354 (333) 123 1 C 769 Copal v Ashutosh 20 I C 312 (313) (Cal.) Persons who allege that the properties disposed of by the deceased (a Mohant) belonged to him not in his personal capacity but in his official capacity as the Mohant of the mutt and really belonged to the mutt re persons who disclaim any interest of the deceased in the property disposed of by him are not entitled to citation and have no locus stands in the Probate Court-Ram Das v Prem Das 10 Pat 817 13 PLT 591 AIR 1932 Pat 95 (96) 136 IC 296 See also Stigobind v Lalihari 14 CWN 119 (121) 2 IC 402 Since these persons (i.e. persons claiming adversely to the testator) are not allowed to contest the grant of probate they are not bound by the proceeding and the order passed by the District Judge cannot have the effect of conferring a title upon the other party in respect of any property which the testator had no right to dispose of-Chotto Mahton Lachms supra.

In order to entitle a p rson to be cited and to contest the grant of probate or letters of administration it is not necessary for him to have an interest in the estate at the time of the testator's death. And so a purchaser (whether by private sale or by a sale in execution of a decree) of one of the properties from an heir of the testator has a locus stands to contest the grant—Nobin Ghandra v. Niboram 59 Cal 1308 36 CWN 635 (638) 140 IC 54 AIR 1932 Cal 754 Mokshadogin v. Aarnadhar 19 CWN 1108 (1109) 31 IC 702 Sheikh Airim v. Chandra Nath 8 CWN 748 Muddun Mohan v. Kals Charan 20 Cal 37 Acmillochum v. Nitrutum 4 Cal 380 (365)

A creditor of the deceased cannot oppose the will he has only a right to a constat of the estate of the deceased to see whether there are assets sufficient to pay the debts but he cannot controvert the validity of the will for it is immaterial whether he shall receive his debt from an executor or an administrator and if a creditor was admitted to dispute the validity of a will it would create infinite trouble expen e and delay to executors—Burrows v Griffiths 1 Cas Temp Lee 544 Mensies v Pulbrook 2 Curt 345 A creditor has no interest in the immoveable property of his deceased debtor unless he has a charge on that property. A creditor of the estate of a deceased debtor is not interested as such in the property within the meaning of this section and has no lower stands to come in and object to the grant of probate unless he objects to the grant on the ground that the will is set up in fraud of creditors—Ma E Me v Ma E 7 Bur L T 245 25 I C 48 But when administration has been granted to a creditor he may oppo e a will he is the same for this purpose as the next of kin—Dabbs v Chisman I Phillim 159 160

But the creditor of an herr of the testator is entitled to oppose the will thus where it is alleged that the will was obtained in fraud of the creditors and was put forward a long time (8 years) after the death of the alleged testator the creditor ought to be given an opportunity to oppose the grant of probate or apply to have it revoked, as their interests are so largely affected by itLakhi Naram v Multan Chand 16 CWN 1099 (1101) 15 IC 686 So also a judgment creditor of the heir of the deceased who would in execution of his decree have a right to seize the property or that share of it which would descend to his debtor and who alleges that the will has been set up for the purpose of defrauding the creditors is a person claiming an interest in the estate of the deceased and as such has a locus stands in opposing the grant of the probate —Aisthen v Satyentra 28 Cal 441 Arakal v Narayana 34 Mad 405 (406) 8 IC 3al These decisions are in consonance with the pronouncement of the Prvy Council in Nilmon v Umanath 10 Cal 19 (27) to the effect that an attaching creditor can oppose the grant of probate or apply to have it revoked only on the ground that the will has been set up or probate has been granted in fraud of creditors. See also Komollochun v Nilruttun 4 Cal 360 (365) (dissenting from Baijnath v Desputty 2 Cal 208) In re Nilmoney 6 Cal 429 (432) (432)

Where the alleged will deprives the heirs at law of their inheritance a creditor of the heirs at law who advanced his money before or during the pendency of the probate proceedings and whose case is that the will was set up or probate was obtained in fraud of the creditors has a right to intervene in the probate proceedings—Dunabandhu v Sarala Sundari 44 CWN 149

A person alleging that he was joint with the testator and claiming the property by survivorship has no locus stands to oppose the grant—Kalajit v Parmeshwar 39 IC 573 (Pat.) Ramyad v Ram Bhaju 10 Pat 812 AIR 1952 Pat 89 (90) 13 PLT 521 135 IC 103

Where the letters of administration were applied for by a person who was not an heir of the deceased (e.g. wise's brother's daughter) a person having some sort of distant kinship with the deceased though he was not an heir of the deceased was allowed to watch and oppose the proceedings—Gourishankar v Satyabaii AIR 1931 Cal 470 (472) 133 IC 212

This section does not entitle a caveator to put forward title to the property not for the purpose of having a grant to himself but for the purpose of preventing a grant to others—Debendra v Surendra 5 PLJ 107 (116) 1 PLT 19 54 IC 807

329 Publication of citation —In the case of an application by the attorneys of the executors who had taken out probate of the will in Canada for letters of administration with a copy of the will annexed in respect of certain property left by the testator in India it was held under the special circumstances of the case that citations might issue by repsitered letter from the Court with acknowledgment due—In the goods of Nicholson 1903 A.W.N 31 Where cita tions are directed by the Court to be issued by means of advertisement in a newspaper the costs must be deposited before the citations should issue—In the goods of Shinvell 1903 A.W.N 30

284 (1) Caveats against the grant of probate or ad-Section 251
Caveats against grant of probate or administration may be lodged with the Act Not District Judge or a District Delegate Section 70

(2) Immediately on any caveat being lodged with any 1881 District Delegate, he shall send copy thereof to the District Act Vio Judge (3) Immediately on a caveat being entered with the District Judge, a copy thereof shall be given to the District Delegate, if any, within whose jurisdiction it is alleged the deceased had a fixed place of abode at the time of his death, and to any other Judge or District Delegate to whom it may appear to the District Judge expedient to transmit the same

Section 252 Act X of 1865 Section 71 Act V of

- (4) The caveat shall be made as nearly as circumstances admit in the form set forth in Schedule V
- 330 Cavegat —It is usual where there is a question about a will or when the right of administration comes in dispute to enter what is called a caveal which is a caution entered in the Court of Probate to stop probates, administrations facilities and such like from being granted without the knowledge of the party that enters—Walliams on Executors 11th Edn p 464

As regards persons who are entitled to enter a caveat see Note 328 under sec 283

A person can oppose the application for granting probate or letters of animatration without lodging a caveat under this section—Aska an Das \ Ram Saran 46 PWR 1910 6 1C 650 The mere entry of a caveat does not make a case contentious—Chotalal v Ban Babuban 22 Born 261 (see this case cited under sec 259)

The form of the caveat shows that the person who enters a caveat admits that the particular property forms a portion of the estate of the testator but objects either to the execution of the will or to the proposed manner of dealing with any portion of the estate—Abhriam v Gopal 17 Cat 48 (52)

Where there is a will propounded and the attesting witnesses and the will propose the court of Probate to fisten with the greatest caution to a caveator whose case rests for the most part on grounds of suspicion on the other hand this principle should be applied in India with considerable discrimination especially in a case where the circumstances attending the will are suspicion of g where the will which could have been registered has not been registered the witnesses have been chosen from a limited circle of friends and kinsmen and the testator has put his thumb impression on the will instead of signing it though he was literate and was not seriously ill at the time—falsor v Juthan 86 IC 642 AIR 1925 Pat 363 (364 365)

Section 253 Act X of 1865 Section 72 Act V of 1881 Section 6 Act VI of 1881 285 No proceedings shall be taken on a petition for

After entry of caveat no proceeding taken on petution until after notice to caveator of caveator of the caveat

tion has been made or notice has been given of its entry with some other Delegate, until after such notice to the person by whom the same has been entered as the Court may think reasonable District Delegate when

A District Delegate shall not grant probate or Section 25 letters of administration in any case in 1865 which there is contention as to the Section 73

not to grant probate or grant, or in which it otherwise appears 1881 administration to him that probate or letters of administration ought not Section 7 to be granted in his Court

Liplanation - "Contention" means the appearance of any one in person, or by his recognized agent, or by a pleader duly appointed to act on his behalf, to oppose the proceeding

330A This section applies to a District Delegate and not to a District Judge The latter officer cannot refuse to grant probate in any case in which there is a contention or in a case where a suit as to the validity of the will has been instituted in a subordinate Court-Permeshri v Tilak Ram 133 I C 896 AIR 1932 Lah 48 (49)

For the meaning of contention see Note 338 under sec 295

Power to transmit statement to District Judge in doubtful cases

In every case in which there is no contention, but Section 253 it appears to the District Delegate B Act Ao doubtful whether the probate or letters Section 74 of administration should or should not Act V of be granted, or when any question arises Section 7

where no contention in relation to the grant, or application for the grant, of any Act VI of probate or letters of administration, the District Delegate may, if he thinks proper, transmit a statement of the matter in question to the District Judge, who may direct the District Delegate to proceed in the matter of the application, according to such instructions as to the Judge may seem necessary, or may forbid any further proceedings by the District Delegate in relation to the matter of such application, leaving the party applying for the grant in question to make application to the Judge

In every case in which there is contention, or the Section 253

District Delegate is of opinion that the C Act Vol Procedure where there is contention or District Delegate thinks probate probate or letters of administration Section 75 should be refused in his Court, the peti- Act V of or letters of administra tion, with any documents which may Section 7 tion should be refused in his Court have been filed therewith, shall be re- Act VI of

turned to the person by whom the appliction was made in order that the same may be presented to the District Judge. unless the District Delegate thinks it necessary, for the purposes of justice, to impound the same, which he is hereby authorised to do, and, in that case, the same shall be sent by him to the District Judge

Act VI of

Section 254 Act X of 1865 Section 76 Act V of 1881 Sections 8 and 9 Act VI of 1881 289 When it appears to the District Judge or District Grant of probate to be under seal of Court Delegate that probate of a will should be granted, he shall grant the same under the seal of his Court in the form set forth in Schedule VI

331 The date of grant of probate is the date on which the order granting it is passed and not any subsequent date of order that the probate should issue —Han Ram v Ram Simpli 27 G W N 285 A L R 1923 Cal 444

Sec 255 Act X of 1865 Sec 77 Act V of 1881 Secs 8 9 Act VI of 1881 Ss 5 and 15 Act VI of 1889

Grant of letters of ad ministration to be under seal of Court

Should be granted he shall grant the same under the seal of his Court, in the form set forth in Schedule VII

331A If the will does not appoint any executor the Court should not grant probate but only letters of administration with a copy of the will annexed If probate is granted the High Court will cancel it and remand the case to the District Judge to grant letters of administration with a copy of the will annexed—Ramsingh v Murtibae 68 IC 940 A IR 1923 Nag 41 (43)

Section 256 Act X of 1865 Section 78 Act V of 1881 Section 6 Act VI of 1881 Administration bond give a bond to the District Judge with one or more surety of administration other than a grant under section 241 is committed, shall District Judge with one or more surety or sureties, engaging for the due collection, getting in, and administering the estate of the deceased, which bond shall be in such form as the Judge may, by general or special order, direct

Section 78 Act V of 1881

- (2) When the deceased was a Hindu Muhammadan, Buddhist Sihh or Jama or an exempted person—
  - (a) the exception made by sub-section (1) in respect of a grant under section 241 shall not operate,
  - (b) the District Judge may demand a like bond from any person to whom probate is granted
- 332. Administration bond —This section is not limited in its opera too to the execution of a surety bond when the letters are first granted but is also applicable if during the continuance of the letters the bond becomes in operative by reason of the death of the surety or its cancellation from some other cause so that a necessity arises to take a second bond with firsh securities—Ray Varani v. Fulkumani 29 Cal 68. The Court is competent to require a new bond or additional security, (from an executior or administrator) where the interest of the estate requires it and specially where some new situation arises such as an unforescen increase of assets or the unexpected breakdown of one or both sureties, or where the suretice become worlthes—Suranian Nath v.

îmrita Lal 47 Cal 115 (120) 23 CWN 763, Bhaguan v Banka Mal 66 I C 367, 2 PWR 1922

An administration bond shall be required in every case from an administrator but prior to the passing of the Probate Act (V of 1881) there was no provision requiring administration bond from an executor (see 4 CLR 488), though in another case (7 Cal 84) an executor was held liable to give such bond in the same way as an administrator. After the passing of that Act the Court had power to demand a bond from the executor if he was a person governed by that Act. This view of the law has been reproduced in this section. In the case of probate a bond can only be demanded from the special classes to whom Act of 1881 applies—Report of the Joint Committee.

But even in respect of those persons (re Hindus Mahomedans etc) the Court has a discretion to demand an administration bond from an executor—Mahamaja v Gangamoji 1 CLJ 180 Surendra v Annila Lal 47 Cal 115 (119) 23 CWN 763 If in a will the testator mentions that the executor should obtain probate of the will without security it is not the function of the Judge to d strust the executor and ask for security—Monmohimi v Taramoni AIR 1892 Cal 733 (734)

In respect of executors, it has been further held in a Calcutta case that it is only at the time when a Judge grants probate that he may demand security after a grant of probate has already been made the District Judge has no authority to call upon the executor to furnish security-Giribala v Bejoy Krishna 31 Cal 688 This decision has been disapproved of as being based on an unduly narrow construction of this section. For this section is quite capable of the more benevolent interpretation that though probate has been initially granted without a bond the Court may in its discretion subsequently require a bond if a change in the situation or conduct or circumstances of the executor renders it necessary-Surendra v Amrila Lal 47 Cal 115 (121) 23 CWN 763 But of course where security was already taken before probate then if the security subsequently becomes insufficient or worthless (owing to the sureties having become insolvent or heavily indebted) the Judge may demand fresh security-Surendra Amrita Lal supra If a probate is revoked and a new executor is appointed it is open to the Judge to direct that security should be given by such executor-Giribala v Bijoy Krishna supra

The bond shall be in such form as the Judge by general or special order directs. It is open to the Court to make a special order as to the form of the bond—In the goods of Gubbay 26 Cal 408. The bond may follow the English form and in the case of a limited or special administration it should provide that the administration will exhibit a true and perfect inventory of the said estate and effects limited as aforesaid and render a just and true account thereof whenever required so to do—Ibid.

Discharge —A surety to an administration bond has no absolute right to get a discharge at any time for the asking nor is it the position that the Court is powerless to grant him relief. In each case a proper order will be made on the facts and circumstances of that case and for that purpose an enquiry into the alleged mal administration may be directed—Problad Chandra v Paran Chandra 22 C.W.N. 1058

Failure to give security—If a District Judge passes an order for the grant of letters of administration and in that order directs the grantee to give an administration bond with surety but the grantee fails to do so the Judge cannot grant letters of administration and has power to withdraw the order for the grant of letters in order to prevent an abuse of the process of the Courty—

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331 The date of grant of probate is the date on which the order granting it is passed and not any subsequent date of order that the probate should issue —Hari Ram v Ram Singh 27 C W N 285 A I R 1923 Cal 444

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Administration bond give a bond to the District Judge with one or more surety, engaging for the due collection, getting in, and administering the estate of the deceased, which bond shall be in such form as the Judge may, by general or special order, direct

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new bond or additional security (from an executor or administrator) where the interest of the estate requires it and specially where some new situation arises such as an unforeseen increase of assets or the unexpected breakdown of one or both sureties, or where the sureties become worthless—Surenda Valh v

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366

Premsukh v Pathati 7 Lah 270 27 PLR 381 91 IC 329 A1R 1926 Lah Fremsukk v Forbolf 7 Lah 270 27 P.L.R. 381 91 I.C. 329 A.I.R. 1826 Lan constitution of the state and the kiters have been exchally knowled there can be no revocation of the Affine The prop r order is to utilidrate the order for the grant of interpretation of the grant of the grant of interpretation of the grant of interpretation of the grant o 18 d | See also Parbate | Frensula 26 PLR 106 & 1C & 351 (355) But the District Judge has pour in a proper case (or in the analysis of the ana Lan 351 (352) But the District Judge has power in a proper case to give the business of the applicant to furnish security and if he fails to give ISEC 291 another opportunity to the applicant to during security and if he fails to so administration.

Department of the stant of the fails to so the stant of the letter of the stant of the stant of the letter of the stant of the letter of the stant of the letter of the stant of the stan so the Judge is authorized to authorize the order for the frant of the letters of an archive was a subset of the today. Where an excutor who was the today to the letters of the finding to the letters of the letters o administration—From Sikh v Forbuts supra

Franco Probate was called upon by the Judge to furnish security but the security bu Aronted probate was called upon by the Judge to furnish security but the security and analysis of the conceptor having become workless he was required to inj iurni shed by the executor having become worthless he was required to the control of the con Ene additional security within a certain time and the executor failed to do so the count would revoke the probate under clause (d) of see 283 or within a count of machine and the count of the probate under clause (d) of see 283 or within the count of t

the COURT WOULD revoke the Probate Under clause (d) of sec 263 or Wilharaw 1, 1 or 1 of probate to prevent an abuse of the Process of the Court the order for grant or probate to prevent an abuse of the process of the Conference of the process of the Conference of Liability after completion of administration — Where the widow of the second an administration the decreed was appointed administration—Where the snow of administrative and she executed an administrative and she executed an administrative with the last the las the deceased was appointed administrative and she executed an administrative and she executed an administrative and she executed an administrative and she confined only the bond was confined only the same c ona under this section held that her liability under the bond was confined only administrators and not to have a technically to her as the widow in the note affective to her as the widow in widow in the note affective to her as the widow in the note of the n to such acts of waste and mismagagement as could be attributed to her as the window who have been as the substitution of his his hashand a state which acts attributed be attributed to her as the window who also should be substituted as the substitution of his hashands as the substitution who also should be attributed to her as the window in the substitution who are substitutions as the substitution who are substitutions as the substitution who are substitutions as the substitution and substitutions are substitutionally as the substitution are substitutionally as the subs administrative and not to any such acts attributable to her as the widow in the same and a second of her husbands estate under the law after the administration was

poseession of her husband's estate under the law after the administration was such as soon as the duties imposed on her as administrative were complied. with (ist filing of inventory and accounts suspect of the deceased to the administration of the estate us so ever and her hability as well as the administration hand emand and are stated as the administration hand emand and are stated as the administration hand emand and are stated as the administration hand emand are stated as the stated are s tec) the administration of the estate was over and her hability as well as the survey of the survey of the administration bond coused and any subse-27 I C 849 (855 856)

Amount of bond —The section provides that administration bond is to be given for the due collection of and administration bond is to construct to county account majorates and the deceased be filen for the due collection of and administering the estate of the deceased amongs. It is afforded a paramagh, conjugation amongs and the security is Socurity is only required to guard against majoractices and the security is time to be important only what the Court has to solve the security is a state of the security in the following the following that the security is a state of the security is a state of the security in the security in the security in the security is a state of the security in enough if it affords a reasonable protection against malpractices which require the court has to satisfy itself is whether the time to be carried out. What the Court has to satisfy itself is whether the court of the security alfords a sufficient safeguard against 3erious of continuous continuous demandad in some back on a sufficient safeguard. amount of the security autores a sundent satestimal against serious of contimous mismanagement. If the security demanded is against serious of contiimproved which make it improved has another the another than nuous muemanagement. If the security demanded is very high or if conditions and interest and int are imposed which make it impracticable for the applicants to furnish the second of the association of the a nty demanded and consequently no letters of administration are taken out the catalog may be seriously imperilied.—Americkand i Mahamid 6. Sofety of the estate may be seriously imperilled—Ameerchand; Mahamund 6 the index onto 1 to exercise a manufacture the index onto 1 to exercise a manufacture december of the index onto 1 to exercise a manufacture december of the index onto 1 to exercise a manufacture of the index of the ind CLJ 453 Mahamaya v Genfomoss I CLJ 180 In seguing security from the executor the Judge ought to exercise a reasonable discretion in prescribing the security from the which the bound the security from the securi the executor the Judge ought to exercise a reasonable discretion in presenting the sum for which the bond should be given—for the Discretion in presenting if the Discretion than if the Discretion thanks it the sum for which the bond should be given—In to succeed the cascular is the sole legaler them if the District Judge thanks it much has a natural time occurring found to make the cascular found the cascular found that it is not sold thanks it Where the executor is the sole legatee then if the District Judge thinks it is an anominal sum—Van necessary to take any bond one security decomposity. Teramont ATR 1929 Cal 733 (734)

funt 1 Transon A1K 1829 Cal 733 (734)
Under see 291 of the Succession Act the District Judge can demand a bond from a person to whom probate is granted only when the deceased beloated a bond in the classical seminancial structure of the classical seminancial seminancial structure of the classical seminancial semin from a person to whom probate is granted only when the decreased belonged to a support of the classes continuousled therein A Classical is not writing and of a support of the continuousle for the co one of the classes enumerated therein A Christian is not within any of the classes referred to it see 291 and so a bond cannot be demanded for granding of the class of a Christian Transport of the class of the class of a Christian is not within any of the class of the c categories referred to in sec 231 and 30 a bond cannot be decoanded for granting 1022 t - h 157

Categories referred to in sec 231 and 30 a bond cannot be decoanded for granting 1022 t - h 157

Emperor 177 IC 391 A IR.

State 151

Special — If the sociality offered by the petitioner is accepted by the Distinct of the American programmer of the American programmer on the American programmer on the American programmer on the on the control of the Distinct on the control of the Distinct on the control of the Judge as sufficient, no appeal hes at the instance of the opposite party on the

ground that the security accepted by the Judge is insufficient—Lucas v Lucas 20 Cal 245~(246)

Liability of sureties -The invalidity of the grant of letters of administration does not render the surety bond void and inoperative. That is the liability of the sureties does not depend upon the validity or invalidity of the grant but depends upon the nature and object of the bond itself. The object of demanding sureties is to prevent the eyil consequences of malleasance or misseasance by an administrator and to protect the interests of the persons really entitled to the assets of the deceased. This being so even though the grant is revoked the sureties are still liable for if this were not so the very object of demanding surestes would be frustrated. So where a person made false representations to the Court and thereby obtained an order granting him letters of administration to the estate of the deceased and induced two other persons to stand sureties for him by means of similar misrepresentations and showing them a copy of the said order whereupon they in ignorance of the true state of affairs executed an administration bond and letters were issued in his favour held that section 20 of the Contract Act had no application to the bond and that the sureties were liable though the grant was void-Debendra v Administrator General 33 Cal 713 (751 752) (FB) 10 CWN 673 3 CLJ 422 affirmed 35 Cal 955 (959) (PC) 12 CWN 802 8 CLJ 94 Where letters of administration have been obtained by fraud the sureties must remain hable for acts of misappropriation by the administrator though they themselves are not parties to the fraud or cognizant of it. The sureties are and must remain liable even though the grant of administration in favour of the administrator has been cancelled and fresh letters of administration have been granted to the Administrator General-Debendia v Administrator General 35 Cal 955 (959 960) (PC)

It was held by the Calcutta High Court that a surety under an adminis tration bond was entitled to withdraw from the suretyship and to apply to be discharged on the ground that the administrator was mal administering the estate and that he (surety) was powerless to stop such mal administration by instituting administration proceedings-Ray Navan v Ful Auman 29 Cal 68 6 CWN 7 The Punjab Chief Court likewise holds that the surety of an executor is entitled to be discharged from his liability if it be shown that the executor is wasting the estate. The course to be adopted is to call on the executor to furnish other security and on his doing so discharge the original surety in respect of future waste or if the executor should fail to furnish such security to revoke the probate and discharge the surety-Shahab ud din v Fa al Din 52 PR 1902 89 P.L.R. 1902 But this view has been disapproved of in the later Calcutta case of Radhika v Ratikanta 76 IC 1009 AIR 1922 Cal 158 where the Judges have said that a surety to an administration bond is not entitled as a matter of right to be reheved of future obligation at his choice he may obtain a discharge on good cause shown but such a cause is not established by merely alleging nusconduct on the part of the administrator The Madras High Court is also of opinion that the surety is not entitled to be relieved from his past or future liability on the ground that administrator is mismanaging and wasting the properties, either by way of application in the probate proceedings or by a eparate suit since the granting of such relief might defeat the very object for which an administrator is required to find sureties to an administration bond-Subroya v Ragammall 28 Mad. 161 (166) (doubting 29 Cal 68) The Allaha bad High Court similarly holds that the surety to an administration bond cannot apply to the Coart to withdraw from his suretyship and to have his surety bond cancelled—Kandhya Lal v Mankı 31 All 56 (57) 6 Al. J 19 (dissenting from 29 Cal 68) This is also the opinion of the Burma Court—Ma Myo v Ma Pua A IR 1921 UB 25 (26) Under the English law the Court will not discharge the original sureties to an administration bond and allow other sureties to be substituted for them—In the goods of Stark (1876) LR 1 P & D 76

The Aliahabad High Court after considering the principles of the above cases has recently declared that though a surety cannot claim as of right to be relieved of all future liability by merely expressing his intention still if the security has been given before a High Court it would be unjust to say that Court would have no right to exonerate a sirety from liability on a sufficient ground being made out. It may be that when the surety furnished security the administrator was an honest person but he might subsequently become dis honest and might mismanage the property or make some other grave default and in such cases the High Court would have full power to grant release to the just of the proving safeguards for the heirs of the deceased. The surety will be relieved from all further liability from the date when full accounts are rendered and the ass ts duly accounted for but he will of course be liable for any mal administration that may be discovered thereafter which was committed prior to the date of release—In the goods of Avinash Chandra 54 All 293 1932 ALJ 140 AJR 1932 ALJ 262 C85) 140 IC 127

On the principle enunciated in the above cases as to non discharge of sureties it has been held by the Madras High Court that the Court will not entertain an application by the sureties to be discharged on the ground that the administration has been complete. The principle of law is that as soon as the administration has become complete the bond works itself out and becomes the factor out and of no effect. There is no need for the Court to make a declara ton vacating an administration bond nor is there any provision in the Indian Succession. Act which authories the Court to make an order discharging the surety in such circumstance—In the matter of hrught 33 Mad 37 (375)

Section 257 Act X of 1865 Section 79 Act V of 1881 292 The Court may, on application made by petition and on being satisfied that the engage tration bond ment of any such bond has not been

kept, and upon such terms as to security, or providing that the money received be paid into Court, or otherwise, as the Court may think fit, assign the same to some person, his executors or administrators who shall thercupon be entitled to sue on the said bond in his or their own name or names as if the same had been originally given to him or them instead of to the Judge of the Court, and shall be entitled to recover theiron, as trustees for all persons interested, the full amount recoverable in respect of any breach thereof

Scope —Under see 292 the assignee of a bond acquires by virtue of the assignment a fresh and independent cause of action. The section deals not merely with procedure but it confers substantive rights and it provides a new starting point for purposes of limitation—Manubhai Chunidal v. General Accident Fire and Life Assirance Corporation. 38 Bom.L.R. 632. A.I.R. 1936 Bom. 363. 165. I.C. 672.

333 Application of section -The only way to proceed against a

surety on an administration bond is the procedure provided by this section 11 to obtain an assignment of the bond and not to follow the procedure of sec 145 C P Code. The latter section does not apply to a probate or administration proceeding hecause though such proceeding may take the form of a suit (sec 295 infia) it is not, strictly speaking a suit or a proceeding consequent thereon within the meaning of sec. 145 C, P Code—Ao Maung v Daw Tok 6 Rang 474 112 IC 427 A IR 1928 Rang 249 (252)

Breach of bond —Failure to exhibit inventor; is a breach of the bond —Achiman v. Chater 10 All 29 There is a breach of the bond where the administrator has not paid a legacy though he has more than sufficient to pay all the debts—Folks v. Documingue 2 Stra 1137 The non payment of a particular debt does not amount to a breach of the bond—Sandry v. Michell 3 B. & S. 405

The assignment of a bond under this section is not a merely formal act. It can only be done on application by petition and on the Court's being satisfied that there has been a breach of the conditions of the bond and then it is to be done on such terms as to security payment into Court and so on as the Court may think fit and of course there must be legal assignment of the bond under the signature of the Judge—Ms Saw v Nga Nyam (1913) 1 UBR 174 21 IC 297 (288)

In an action brought on the breach of an administration bond assigned over to the planntiff he cannot sue merely to recover the loss which he himself has suffered from the mal administration of the estate but he must see in a representative capacity as the trustee of all persons interested in the estate to recover the full amount of wastage—Mi Saw v Ngo Nyan supra but he cannot recover more damages than he could prove to have resulted to himself and to those interested in the bond on which he relies. A bond of this description cannot be regarded as an instrument covered by the exception to sec 74 Contract Act so that the whole sum mentioned in the bond might become payable on the breach of a condition therem—Lachman Das v Chater 10 All 29 See also Chandra Mohan v Rohim 64 IC 366 (Cal)

334 Assignment of bond —Under sec 291 the administration bond should be given to the Lidge of the District Court. In the crose of an application in the Original Side of the High Court, the practice is to take administration bonds in the name of the Chief Justice and the proper person to assign such a bond under this section is one of the officers of the High Court of the Registrar on the Original Side—Debendra v. Idministrator General. 33 Cal. 713 (733) (8B).

This section is not confined to private individuals only an administration bom may be assigned to the Administrator General—Debendra v. Administrator General super An administration bond may be assigned to a creditor—Lackman v. Chater 10 All 29. Sandry v. Michell 3 B. & S. 405. But the assignment will not be made at the instance of a creditor who can otherwise recover his dobt—In re Saunders 6 N.W.P. 62.

No one except the Judge or the person to whom the bond is assigned can sue. Even a succeeding administrator cannot sue the sureties of the previous administrator on the security bond unless it is assigned to him. Ct. Iniar Nath v. Thakur Das 5 All. 248 (252)

A Judge has no authority to assign an administration bond a second time to another person so long as the previous assignment of the sunc bond to a person is in force—Kalmuddin v Weharu 39 Cal 561 (507) 16 CWM 662

But if there had been a condition in the bond that the assignment should be void if the assignee failed to comply with certain requirements then on breach of such condition a re-assignment might have been possible—Ibid

If a bond has ceased to be operative an order assigning the bond is wrong —U Po Hnit v Maung Bo Gyn 118 I C 401 AIR 1929 Rang 109 (110)

The Court will allow an administration bond to be assigned upon being satisfied that the application for the order is made bona fide and that a primal facie case is made out and that the applicant is the proper person to whom the bond should be assigned—In the goods of Young LR I P & D 186

Notice — Before assignment is made some sort of notice should be given to the sureties and the administrator—Baler v Brooks 3 5% & Tr 32 Proceedings for assignment of the administration bond are not binding on the surety unless notice of the assignment was given to him and he was made a party to those proceedings. In cases where a surety is only bound to pay a liquidated sum in respect of the principal's breach of the administration bond no notice of the assignment is necessary to be given to the surety. But when after the execution of the administration bond a great deal of httgation ensued in the course of which the administrator was removed a receiver was appointed as well as a commissioner to take accounts and the bond was assigned the surety cannot be made liable unless he has been a party to the assignment proceedings and also has had an opportunity of testing the correctness of the accounts—Hamadonee v Ma Shue 4 Rang 358 A IR 1927 Rang 28 (29) 98 IC 459.

Fresh application —An application under this section is really made in Fresh application being entertained in the hard of a fresh application being entertained in the exercise of inherent jurisdiction when the first application had been dismissed in default and not on ments—Haribux v Shamundar AIR 1935 Lah 145 158 IC 384

Full amount recoverable in respect of any breach thereof—
The words the full amount recoverable in respect of any breach thereof mean
the loss for which the obligors under the bond are lable and do not mean the
amount recoverable in law at the date of the assignment—Manubhai Chunilal
v General Accident Fire and Life Assurance Corporation 38 BomLR 632 AIR
1038 Bom 383 165 IC 672

Appeal —There is no appeal against an order under this section passed by a District Judge assigning an administration bond, but when the Judge passes an order which he has no authority to do the High Court may interfere treating the memorandium of appeal as an application for revision—Kolimuddin y Meharus 39 Cal 563 (566) 16 CW.N 662 The Rangoon High Court holds that an order assigning an administration bond is appealable—U Po Hint V Meung Bo G): 118 IC 401 AIR 1929 Rang 109 (110) See Notes 345 and 346 under sec 299

293 No probate of a will shall be granted until after
Time for grant of probate and administration no letters of administration shall be
granted until after the expiration of fourteen clear days from
the day of the testator or intestate's death

335 The letters of administration do not include letters of administration with the will annexed. The latter may be granted after the expiration of seven clear days from the testator's death—In the goods of Wilson 1 Cal 149

Section 258 Act \ of 1865 Section 80 Act V of 1881

An application for the grant of probate or letters may be made before 7 days or 14 days, though the actual grant cannot be made till after that period See Ibid

(1) Every District Judge, or District Delegate, Section 255

Filing of original wills of which probate or ad ministration with will annexed granted.

shall file and preserve all original wills, 1865 of which probate or letters of adminis- Section 81 tration with the will annexed may be 1881 granted by him, among the records of

his Court, until some public registry for wills is established

(2) The Provincial Government shall make regulations for the preservation and inspection of the wills so filed

336 If a will is not filed as required by this section the proceedings to obtain the grant of probate are defective and the grant should be revoked under sec. 263-In the goods of Grant 1 PR. 1902 37 PLR 1902

In any case before the District Judge in which Section 261 there is contention, the proceedings 1865 Procedure in conten shall take, as nearly as may be, the Section 83 tious cases

form of a regular suit, according to 1881 the provisions of the Code of Civil Procedure, 1908, in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff, and the person who has appeared to oppose the grant shall be the defendant

Scope of section -Like the English law the Indian law makes a distinction between proving a will in common form and proving a will in solemn form (for meaning of these terms see page 327) as the sections of this Act point clearly to a difference between cases which are contested and cases which are not contested and this section lays down the procedure in contested cases-Rebeils v Rebells 2 CWN 100 (102) But a grant of probate made in the mofussil is not quite the same as a grant in common form for the grant is made after the execution of the will has been sworn to by the witnesses to the will and the only circumstance that distinguishes it from the grant in solemn form is that the grant is made ex parte-Durgagats v Saurabini 33 Cal 1001 (1008) 10 CWN 955

This section does not apply to a proceeding for revocation of a probate because such a proceeding does not take the form of a suit. Such a proceeding is governed by sec. 268-Sarada Kanta v Gobinda 12 CLJ 91 6 IC 912 (915) Pratap Chandra v Kalı Bhanjan 4 CWN 600

338 Contention -- The proceeding commenced by an executor who applies for probate does not become contentious and does not acquire the character of a suit till the caveat has been entered-Ramani v Kumud Bandhu 14 CWN 914 (926) 12 CLJ 185 7 IC 126 In re Danubar 18 Bom. 237 Even the mere entry of a caveat does not make a proceeding necessarily con tentious. It is not the filing of the caveat but the filing of the affidavit in support of the caveat in the High Court and the filing of the written statement in the Molussil that makes the matter contentious-Chotalal v Bat Kabubas 22 Bom 261 (265) Surendra v Kasımonı 1 CLJ 49 A cıtatıon for probate is not a summons to appear. Merely citing a person in a probate application

But if there had been a condition in the bond that the assignment should be void if the assignee failed to comply with certain requirements then on breach of such condition a re assignment might have been possible—Ibid

If a bond has ceased to be operative an order assigning the bond is wrong

-U Po Hnit v Maung Bo Gy: 118 IC 401 AIR 1929 Rang 109 (110)

The Court will allow an administration bond to be assigned upon being satisfied that the application for the order is made bona fide and that a prima facte case is made out and that the applicant is the proper person to whom the bond should be assigned—In the goods of Young LR 1 P & D 186

Notice —Before assignment is made some sort of notice should be given to the united and the administrator—Baker v Brooks 3 5w 4 Tr 32 Proceedings for assignment of the administration bond are not binding on the surety inless notice of the assignment was given to him and he was made a party to those proceedings. In cases where a surety is only bound to pay a liquidated sum in respect of the principals breach of the administration bond no notice of the assignment is necessary to be given to the surety. But when after the execution of the administration bond a great deal of hitigation ensued in the course of which the administrator was removed a receiver was appointed as well as a commissioner to take accounts and the bond was assigned the surety cannot be made hable unless he has been a party to the assignment proceedings and also has had an opportunity of testing the correctness of the accounts—Hamadance v Ma Shue 4 Rang 358 A IR 1927 Rang 28 (29) 98 IC 459.

Fresh application —An application under this section is really made in proceedings in the nature of execution and is no bar to a fresh application being entertained in the exercise of inherent jurisdiction when the first application had been dismissed in default and not on merits—Henbux v Shamsundar AIR 1835 Lah 185 IC 384

Full amount recoverable in respect of any breach thereof —
The words the full amount recoverable in respect of any breach thereof mean
the loss for which the obligors under the bond are liable and do not mean the
amount recoverable in law at the date of the assignment—Manubhai Chunilal
v General Accident Fire and Life Assurance Corporation 38 Bom.L R 632 A I R
1938 Bom 363 165 I C 672

Appeal —There is no appeal against an order under this section passed by District Judge assigning an administration bond but when the Judge passes an order which he has no authority to do the High Court may interfere treating the memorandum of appeal as an application for revision—Kalimuddin y Mehariu 39 Cal 563 (566) 16 CWN 662 The Rangoon High Court holds that an order assigning an administration bond is appealable—U Po Hint V Maung Bo Gj. 118 IC 401 AIR 1929 Rang 109 (110) See Notes 345 and 346 under sec 299

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294 (1) Every District Judge, or District Delegate, Section 259

Filing of original wills shall file and preserve all original wills, 1865

Filing of original wills Section 81

y District Judge, or District Discipling Act X of shall file and preserve all original wills, 1865 of which probate or letters of adminis-Section 81 tration with the will annexed may be 1881 granted by him, among the records of a public registry for wills is established

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(2) The Provincial Government shall make regulations for the preservation and inspection of the wills so filed

336 If a will is not filed as required by this section the proceedings to obtain the grant of probate are defective and the grant should be revoked under sec. 283—In the goods of Grant 1 PR 1903 37 PLR 1902

295 In any case before the District Judge in which Section 261
Act X of
Procedure in conten chall take as nearly as may be the Section 83

shall take, as nearly as may be, the Section 83 form of a regular suit, according to 1881 the provisions of the Code of Civil Procedure, 1908, in which

the provisions of the Code of Civil Procedure, 1908, in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff, and the person who has appeared to oppose the grant shall be the defendant

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This section does not apply to a proceeding for revocation of a probate because such a proceeding does not take the form of a suit Such a proceeding is governed by sec. 268—Sarada Aanta v Gobinda 12 CLJ 91 6 IC 912 (915) Pratap Chandra v Kali Bhanjan 4 CWN 600

338 Contention — The proceeding commenced by an executor who applies for probate does not become contentious and does not acquire the character of a suit till the caveat has been entered—Ramans v Aumud Bandhu 14 CWN 914 (926) 12 CLJ 185 7 IC 126 In re Daubba 18 Bom. 237 Even the mere entry of a caveat does not make a proceeding necessarily contentious. It is not the filing of the caveat to the filing of the affidavit in support of the caveat in the High Court and the filing of the written statement in the Mofussi that makes the matter contentious—Chotalal v Bai Kabubai 22 Bom 261 (265) Surcadra v Kasimoni 1 CLJ 49 A citation for probate is not a summons to appear Mertly citing a person in a probate application

does not make him a defendant. Under this section the cause must be contentious and the person cited must appear to oppose the grant before he contentious and the person cited must appear to oppose the grant before me becomes a defendant—Saroja Sundari v Abhoy Chatan 41 Cal 819 (823) 24 DECOMIC 3 OCICHOLINI - Saraja Sundari V. Annoy Charan 41 Lai 819 (c. 27 Radhash) am V. Ranga Sundari 24 C W V 541 (515) 59 IC 661 15EC 290 The entry of a caveat is not necessarily a contentious proceeding and doe The entry of a casest is not necessarily a contentious procteding and one necessarily imply an intention to oppose the grant. For the caseator may not necessarily imply an intention to oppose the grant. For the caveator may only want time to make inquiries and obtain information—Motor v. Plott 11896] P 214 Salter v Salter [1896] P 291

Rival Wills If two wills are set up by two persons in respect of the Attvai Wills — It two wills are set up by two persons in respect of the parties interested in opposing the grant have to file their came estate the pairties interested in opposing the grant have to the unen-tespective caveals in each case so that the petition becomes a suit in each case and respective caverage in each case so that the putition becomes a suit in each case and the suits are heard together and consolidated the suits are numbered and both the suits are heard together and consolidated it is therefore necessary that even the caveator must produce the null set up It is therefore necessary that even the cascator must produce the will set up by him along with his petition and it must be filed and propounded before the by him along with his petition and it must be nied and propounded before unit can proceed. Venidas v. Bai Champabai 53 Bom. 829 31 Bom.LR 1014 122 IC 126 A IR 1930 Bont 29 (30)

contention between the parties the proceedings should take the form of a surt \*\* contention between the parties the proceedings should take the total of a sun according to C P Code it is not open to the Court in such a case to proceed according to C r Loue it is not open to the Lourt in such a case to proceed to decide the matter in a summary fashion leaving the decision subject to to accuse the matter in a summary fastion leaving the accision subject to modification in a suit to be held afterwards—Abor Mohammad v. Mohammad v. Mohammad v. Mohammad modification in a suit to be held atterwards—Noor Monammad v Mohammad Karim 176 IC 895 AIR 1938 Mad 502 So long as a Petition for probate Karım 176 I C 895 A I R 1908 viad buz bo song as a petition for probate of administration is non contentious it is to be dealt with by the or letters of administration is non-contentious it is to be dean with by the Registrar (in High Court) as soon as it becomes contentiols it is to be treated Registrar (in High Court) as soon as it becomes contentions it is to be treated as a plaint in a suit governed as far as practicable by the procedure under as a piaint in a suit governed as iar as practicable by the procedure under the C P Code

Where on the filing of the affidavit in support of the careat the C P Code Where on the ning of the amount in support of the caveat the matter becomes a suit the whole suit must be disposed of by the decree the matter occomes a suit the whole suit must be disposed of by the decree of the Court and where at the hearing of the suit the defendant does not of the Court and where at the nearing of the suit the defendant does not appear in support of the caveat it is not a correct procedure merely to dismiss appear in support of the calcar it is not a correct procedure merely to dismuss the careat leaving it to the Registrar to dispose of the petition as in a non the caveat leaving it to the Registrar to dispose of the petition as in a non contentious matter but the caveat should be dismissed and probate or letters contentious matter but the caveat should be dismissed and probate or letters of administration should be issued provided that the Court is satisfied that or administration should be issued provided that the Court is satisfied that the papers are in order and in case of probate that the will was duly executed the papers are in order and in case of probate that the will was duly executed — Chotalal v Bas Kabuban 22 Bom 261 (266) A probate proceeding becomes Contentious where there is an appearance with a view to oppose the proceedings contentious where there is an appearance with a view to oppose the proceedings.

The subsequent withdrawal from the case of the pleader for the objector loss. The subsequent withdrawa iron the case or the pleaser for the objector cross not have the effect of transforming it into a non-contentious proceeding. Its not have the enect of transforming it into a non-contentious proceeding its effect is merely to make it an undefended suit. Consequently probate cannot enect is merely to make it an underended suit to consequently product camer that is the applicant is not be granted in common form but in solenin form that is the apparature is the objector has not opposed the claim. entities to succeed merely breatise the objection has not opposed the tidule, but the Court in passing the order must be satisfied on the evidence produced but the Court in passing the order must be satisfied on the evidence production before it that the claim is well founded.—Phannadia v Nogendra 39 CLJ

Where there is contention the probate proceedings take the form of a such Where there is contention the property proceedings take the torn of a such a proceeding the subject matter of the suit is the property of which the In such a proceduring time suspect matter of the sun is the property of which the executor is the legal owner under the will of the testator and of which the executor is the regai owner inner toe will of the executor recognizes from before the Court produce by occurring rum to be the executor recognizes min before the court as [gal owner—In re will of Databoa 18 Bom. 237 (240)

The proceedings as regal owner—in re use of Donkour to Bonk and Color ine processing shall take as nearly as possible the form of a regular sut. Every considera shall take as nearly as possible to turn or a regular suit. Every consideration which ought to induce the Court to refuse probate of the will must be ton which ought to induce the count to reuse processe of the will must one taken into account. The Court is bound to consider not only whether the taken into account the Louis is bound to consider not only whether it is valid or not

ad rhether probate ought to be granted-Annoda v Jugutmon: 6 CLR, 176 n contentious proceedings the grounds of objection should be in the form of a ileading and should be properly verified in accordance with the provisions of 3 6 r 15 Similarly, the reply of the applicant should be properly venfed, and the lurther proceedings thereafter should be conducted in the same way as a suit according to the provisions of the C P Code in which an issue should be framed and the parties should be examined on oath-U Shire & Marie Con. 3 Bur L J 68 AIR 1924 Rang 273 (274) 82 IC 973

Section 268 lays down that the provisions of the C P Code are in aprily to a probate proceeding only in so for as the encumstances of the ene all alma? and this section provides that the proceeding is to take as as I as Tay to be form of a suit It clearly implies that the proceeding is me -c'a me i forms Kanhana Lal - Gendo, 50 All 238, 107 IC 34 AIR \_3 17 7 2 4 does not say that the proceedings of the C P Code are made we grabate proceedings in their entirely Therefore, an applicate of their entirely he is to be treated as a plaintiff is not to be regarded as a second or second a uit in respect of some cause of action within the man, of C - 1 . I where an application for probate by the executor has see from at a seed, such dismissal does not bar the presentation of a secret contains of and under O 9 7 9-Ramons v humud Bandru 18 CF3 2 -1 7 5C 126 12 CL 1 185 Where an application for press - 2 res has seen dismissed for default the legatees hears can a new and no marting the will as a defence to a suit for the property and and an and a suit as a them under the will-Ganshamdas v Smarza a in the will (869) 21 LW 415 So also it has been ted in The ad a 4 \$ 110 C P Code are riade applicable to testamentes accommon il is a " a " appli cation for probate had been unhidrant tele. Le preserve a me tirten tions the provisions of sec 373 C P Cide 9 - " & the arthurble so that the peritioner is calified as to said a post of a se and in opposition to an application for goal of exert for a doct the estate of the deceased-Pakiam v Innan, 19 11 4

But where an application for prize fire to 11 or merits viz on the ground that the want to I has het would it it and the will is invalid the judgmen 2.3 four 42 2 166 3264010 but need the parties and the executors and be published to experience and he a helesse to a suit brought by the lessant been a tree fine with it the parter of the ro them-Kalsan Chand & Stehn 30-36 22, I send send 16 10 325 (331) Remant v Aural Pass II Ch. 125 17601, 11 (1) 16 When a will has been properties gard, I sel and fails expected in the ments it would belief he pass it we as not so past affire it half muchels if it could be with the first of me and fully and it is the above the might be intreded 2d to the off and one fution of 17 then Schultz v Schultz (Mad) 9, 32 for a group fution there is the

of probate is decisive only of the genuineness of the will propounded and of the right of the executors thereby appointed to represent the estate of the testator. It is not the function of the Court to go into the question of the tile of the testator with respect to the property of which the will purports to dispose or the validity of such disposition—Horimispi v Bai Dhanbaiji 12 Bom. 164 Bal Gangadhar Tilak v Sakwarbai 26 Bom 792 (795) Biji Nath v Chandar Mohan 19 All 458 (460) Komalangi v Saubhagammal 54 Mad 23 59 MLJ 329 AIR 1931 Mad 37 (38) 128 IC 476 Nathon v Nathon 7 OWN 373 AIR 1930 Oudh 272 (273) Behari Lall v Juggo Mohun 4 Cal 1 And so a Court cannot refuse to grant probate of a will because the testator had no power to dispose of some or even all the property he purported to deal with—Barot Parsotam v Bai Muli 18 Bom 749 Ralph v Hale 7 PR 1902 Rajamanikam v Farrar 16 LW 455 AIR 1923 Mad 131-(133) 69 IC 954 Soubhaguammal v Komalangi 54 MLJ 332 AIR 1928 Mad 803 (805)

Probate Court's decision is not res judicata ... In proceedings under this Act the Court decides the question of representation to the estate and not distribution and it is only for the purpose of determining the former question that the Court decides the right of the party to the whole or part of the estate Consequently the decision come to by the Court as to the right of a party to inherit does not operate as res judicata in a suit for administration or possession of the property-Maung Tun v Ma Sein 1 Bur L J 59 AIR 1923 Rang 9 68 I C 671 Nandeshuar v Munnt 9 O W N 1078 A I R 1933 Oudh 84 (85) The finding of a Probate Court on the construction of a will being merely incidental and for the purpose of determining the question of the representative title of the applicants cannot be regarded as precluding a party to the applica tion for probate by res judicata from obtaining a construction of the will in a suit brought by him-Arun-no31 v Mohendra 20 Cal 888 If letters of admi nistration are granted to the defendant in preference to the plaintiff the order granting such letters does not preclude the plaintiff from bringing another suit in order to determine question relating to inheritance or the right to be appointed shebait-Jagannath v Ranjit 25 Cal 354 (369) Where a certain individual applied as the daughter of the deceased for letters of administration to the estate of the deceased and an issue was framed as to whether she was the daughter of the deceased it was held that the decision of the question of status as daughter in that proceeding being only incidental was not res judicata in a regular suit in which such status required to be determined-Ma Chem v Maune Tha LBR (1893 1900) 653 (654) The dismissal of an application for probate for default of appearance does not imply an adjudication of the issue of the genuine character and legal validity of the will and therefore does not operate as res judicata so as to bar a subsequent application for probate-Ramans v Aumud Bandhu 14 CWN 924 (925) 7 IC 126 A refusal to grant probate does not conclusively show that the will propounded is not the genuine will of the testator and does not prevent the adjudication of the question in a subsequent proceeding-Ganesh v. Ram Chandra 21 Born, 563

Section 333 Act X of 1865 Section 157 Act V of 1881 Sections 10 and 17 Act VI of

1889

296 (1) When a grant of probate or letters of administration is revoked or annulled under this Act the person to whom the grant was made shall forthwith deliver up the probate or letters to the Court which made the grant

(2) If such person wilfully and without reasonable

cause omits so to deliver up the probate or letters, he shall be pinushable with fine which may extend to one thousand rupees, or with imprisonment for a term which may extend to three months, or with both

341 From a just reluctance to leave a revoked grant in the hands of its grantee (possibly an un crupialous person) the Court requires it to be produced and delivered to the registrar at the time of its resocution to that it may be afterwards cancelled in the registry—Tristram & Coote 13th Edn p 194 Where the revoked grant had been lost the Judge required an undertaking to be given to bring in the lost grant if found and that it would not be acted on —In the goods of Carr 1 Sw & Tr 111 If owing to the grantee having left the equality it is impossible to compel the production of the grant the Court will revoke it though it cannot cancel it—Baker v Russell 1 Cas Temp Lee 187

297 When a grant of probate or letters of adminis- Section 262

Payment to executor or administrator before probate or administration revoked

tration is revoked, all payments bond Act X of fide made to any executor or adminis-Section 84 trator under such grant before the re-Act V of vocation thereof shall, notwithstanding

such revocation, be a legal discharge to the person making the same, and the executor or administrator who has acted under any such revoked grant may retain and reimburse himself in respect of any payments made by him which the person to whom probate or letters of administration may afterwards be granted might have lawfully made

- 341A Effect of revocation—There is nothing in the Probate and Administration Act (now Succession Act) to suggest that a grant either of probate or letters of administration becomes on revocation void ab initio A mortgage therefore by the administrator on the grant of such probate does not become invalid merely on account of the subsequent revocation of the probate by the Court—A B Neogs v B B Neogs 174 IC 186 AIR 1938 Rans 43
- 342 Payment to and by executor, etc —Payment to an executor who had obtained probate of a forged will is a discharge to the debtor notwith standing that the probate was afterwards declared null and void The reason is, that every person is bound by the judicial acts of a Court having competent jurisdiction and during the existence of such judicial act the law will protect every person obeying it—Allien v Dundas 3 TR 125 129 The grantee of letters of administration fully represents the estate of the deceased. All payments made to him under any decree obtained by him affords full indemnity to the person so paying against the claim of any other party—Ambica Churn Alale Chandra 10 CWN 122 (425)

Although letters of administration have been obtained by fraud so long as the grant remains unrevoked the grantee though a rogue and an impostor is to all intents and purposes, the administrator He and he alone represents the estate of the deceased. His receipts are valid discharges for all money received by him as administrator—Debendra v Administrator General 35 Cal. 955 (9.99) (P.C.) 12 C.V. N. 802 8 CL.I. 94

So also all lawful payments made by a person to whom probate of a forged will was granted but subsequently revoked may be re-imbursed out of the estate of the deceased funder this section. Thus a widow was held entitled to re-imburse herself out of the assects of her deceased husband's estate in respect of payments made by her while acting under a probate which was sub-sequently revoked—Prayrag Rog v Goukaran 6 C CWN 787 (783) Where administration was granted and afterwards there appeared to be an executor if the administrator had paid debts legacies or funeral expenses which the law forced the executor had only the administrator in an action against him by the executor should recoup so much in damages because he was compelled to pay it and the true executor had no prejudice by it inasmuch as he himself would have been bound to pay it—Peckham rease cited in 1 Plov 282

Sale under void grants -In England a distinction was formerly drawn between grants which were rold ab initio (ie where letters of administra tion were granted in derogation of the right of an executor) and grants which were merely voidable (where the administration had been granted by the proper jurisdiction and was only in derogation of the right of the next of kin or of a resi duary legatee) If the grant was void (e.g. if a grant of administration was obtained by suppressing a will) it was held that the mesne acts (e.g. sale mort gage lease) of the executor or administrator done between the grant and its revocation could be of no validity-Grazebrook v Fox (1565) 1 Plow 275 Abram v Cunningham (1677) 2 Lev 182 Woolley v Clark (1822) 5 B & Ald 744 Ellis v Ellis [1900] I Ch 613 Following these cases it was held by Mitra J in Debendra v Administrator General 33 Cal 713 (750 753) that where a grant was void all acts done under it were also void and that a sale of shares by the administrator under a void grant conferred no title on the purchasers and that this section was not intended to afford protection to unwarrantable and fraudulent dispositions by the administrator whose title rested on a grant absolutely void.

But these English decisions have been overruled by the decision of the Court of Appeal in Heusen v Shelley [1914] 2 Ch 13. In this case letters of administration were granted to the widow of the deceased who was believed to have died intestate and she sold and conveyed to a purchaser a portion of the deceased seriel estate. Upon the subsequent discovery of a will the executors named thereby obtained a rivocation of the letters of administration and a grant of probate to themselves, and brought an action to recover possession of the real estate sold by the administratival. It was held that the grant of administration to the widow was not void ab initio and that the purchaser that acquired a good title it was also held that even if the grant of administration lad been void for want of jurisdiction it was an order of Court by virtue of which the purchaser's title would be protected.

It should be noted that even prior to the passing of this decision it was held in another English case, that a grant of letters of admin stration obtained by suppressing a wall was not roid ab mitse but roidable only and consequently a sile of lease-holds by the administrator to the parchaser who was a normal to the appression of the will was upheld by the Court although the grant was revoked after the sale—Basal's Bosall (1881) 27 Ch D 220. This decision has been followed in Gopal Dass v Bustee Dass 33 Cal. Los? (601) and the same view has been upheld in Sudaja v Jaku Nath 19 C W 210 (211) 27 IC, 715.

Grant set used on appeal -1 distinction is drawn between the case of a grant being revoked and a gran being set used in aft 1. If a grant is revoked

all acts done by the executor or administrator under the grant shall be valid under the provisions of this section but if a grant is reversed on appeal all intermediate acts of the executor or administrator are ineffectual because the appeal suspends the former sentence and on its reversal it is as if it had never existed —Williams on Executors 11th Edn p 473

298 Notwithstanding anything hereinbefore con-Section 85 dained, it shall, where the deceased was 1881 and Muhammadan, Buddlust or exempted person, or a Hindu, Sikh or Jama to whom section 57 does not apply be in the discretion of the Court to make an order refusing, for reasons to be recorded by it in writing, to grant any application for letters

344 This section enacts that it is within the discretion of the Court to refuse to grant an application for letters of administration but no such discretion is given in regard to an application for probate by a person selected by a testator for the administration of his estate. The Judge is incompetent to refuse probate to the executor—Pran Nath v Jado Nath 20 All 189 (191). An application for letters of administration with the will americal stands on the same footing as an application for probate and the Court cannot refuse the letters unless it finds that the will was not executed by the testator or that he was not of a sound discossing mind—Babu Misra v Utier Pershad 110 PWR 1918.

of administration made under this Act

299 Every order made by a District Judge by virtue Section 263

Appeals from orders of District Judge of the powers hereby conferred upon 1865 him shall be subject to appeal to the Section 86 High Court in accordance with the Act Vof

provisions of the Code of Civil Procedure, 1908, applicable to appeals

345 Where appeal hes —This section allows an appeal not only from the order of a District Judge but also from an order of a Subordinate Judge in a probate proceeding which has been transferred to the latter by the District Judge under sec 23 of the Bengal Agra and Assam Civil Courts Act (XII of 1887) The order is appealable to the High Court and not to the District Judge —Barodo v Phutumani 14 PLT 285 145 IC 375 AIR 1933 PAL 275 (277)

An order of a District Judge refusing to grant probate or administration is a decree with the meaning of sec 2 C P Code (1908) and is appealable—Mountstephens v Orme 35 All 448 (449) 22 I C 98 An order calling upon the applicant for probate to pay an enhanced court fee calculated in accordance with the provisions of Act VII of 1910 being in effect a refusal of the application is appealable—Suarnamoji v Secretary of State 20 CWN 472 (473) 30 I C 394

So also an appeal lies from order of a District Judge granting probate or letters of administration—Arthur Lane v Hedasatulla 1895 AWN 127 An appeal lies under the Letters Patent from the judgment of a single Judge in appeal from an order of a District Judge granting probate of a will—Umrao y.

Bindraban 17 All 475 Since an order granting a probate is appealable an application for revision is not entertainable-Chotoo Mahton v Lachmi 11 PLT 219 AIR 1930 Pat 354 (355) 125 IC 769 An order made by a Judge of the High Court refusing to stay the issue of probate and the discharge of the Receiver appointed in a probate action is a judgment within the meaning of clause 15 of the Letters Patent and is appealable. Brij Coomarce v. Ramiick 24 All 13 (PC) 5 CWN 781 An order of the District Judge admitting a person as a caveator under sec 283 was appealable under sec 588 (2) of the C P Code of 1882-Abhrram v Gopal Das 17 Cal 48 (51) But as sec 588 (2) of the Code of 1882 has not been reproduced in the Code of 1908 there is no provision for an appeal in a case where the District Judge decides that a person has locus stands to contest a will-Lakhs Naram v Multan Chand lo CWN 1099 (1100) 17 CLJ 230 15 IC 686 A surety of the executor is entitled to be discharged (according to the Punjab Chief Court) from his liability as regards the future transactions of the latter when the executor for whom he is surety wastes the estate. As the effect of his discharge would be to revoke the probate if fresh security is not furnished an appeal lies from an order refusing to grant such discharge-Shahabud din v Fa al Din 52 PR 1902 89 PLR 1902 An order revoking probate if security is not furnished is appealable-Ibid An application under sec 263 for the revocation of a probate is considered to be a suit and an order dismissing such application on the ground that the applicant had no locus stands to bring the suit is appealable-Sheikh Azim v Chandra Nath 8 CWN 748 An appeal lies from order assigning an administration bond under sec 292-U Po Hmt v Maung Bo Gy: 118 IC 401 AIR 1929 Rang 109 (110) distinguishing Kalimuddin v Meharus 39

The Rangoon High Court has pointed out that the wording of the present section is different from what it stood under sec 86 of the Probate and Administration Act 1881. The older Act contained the words at the conclusion of the section under the rules contained in the Civil Procedure Code applicable to appeals. This meant that only such appeals could be as were provided by the rules under the C P Code (see Kalimuddin v Mchanu 39 Cal 563) but the wording of the present section is maccordance until the prosisions of the Civil Procedure Code etc. This means that appeals shall be from all orders of the District Judge passed under this Act and that such appeals shall be governed in the protedure to be observed by the provisions of the C P Code. And so whereas an order assigning a security bond under sec. 292 was not appealable under sec. 86 of the Probate and Administration Act. 1881 (see 39 Cal 563) such an order is now appealable under the present section 299—U Po Hint v Maunt 36 G5; 118 IC 401 AIR 1892 Rang 199 (110)

But the Allahabad High Court is inclined to hold that no such change is intended by the Legislature by the slight change in the phrascology of the section It is doubtful whether it has been intended to make every order passed by the District Judge under this Act necessarily appealable. For instance if orders postponing a care or retirensi to adjourn a case were appealable the position might well become intolerable—Bhupendra v Ashtablinja 1932 A LJ 418 139 IC 156 ALR 1932 All 379 (380)

The word hereby in this section means by the whole Act (V of 1881) and not merely by the Chapter in which this section occurs. Therefore an order of a District Judge granting permission to the executor or administrator for the disposal of immoscable property under see 307 (in the next Chapter) is appeal able—Uma Charan v Muktakishi 28 Call 149 5 CV N 443 Sarat Chandra

v Benode Kumarı 20 CWN 28 33 IC 143 Hajı Pu v Tin Tin 2 Rang 117 (120) AIR 1924 Rang 237 (238) 80 IC 746

The memorandum of appeal under this section must be accompanied by a copy of the decree appealed against and unless it is so accompanied the appeal cannot be entertained by the High Court—Hem Chandra v Jadub Chandra 16 CL J 116 17 1C 99 (100)

346 Where appeal does not lie - The meaning of this section is not that any and every order which might be made by a District Judge in a probate case either for the attendance of a witness or for the production of the document or any other interlocutory order is subject to appeal to the High Court but the words every order are controlled by the concluding words which make all appeals under this section subject to the rules contained in the C P Code applicable to appeals. In other words this section allows an appeal to the High Court only in those cases in which an appeal is allowable under the C P Code Therefore where an application for probate has been granted but on an objection being made a subsequent order is passed directing that the case he re opened that probate be suspended for a certain time and that the executor must bring in his evidence to prove his right to obtain probate held that no appeal lies from such an order-Brojo Nath v Dasmony 2 CLR 589 Under sec 588 (2) C P Code 1882 an appeal is alloyed from an order striking out or adding the name of any person as plaintiff or defendant but no appeal is allowed from an order refusing to add the name of a person so there is no appeal against an order refusing to make a person who opposes probate a party defendant to an application for probate-Ahettramons v Shjama Charan 21 Cal 539 No appeal hes merely from an order refusing a cavcator to oppose a grant-Prasad Narain v Dulhin Genda 18 CLJ 612 22 IC 276 Indu Bala v Panchu Mon: 19 CW,N 1169 21 CLJ 292 28 IC 578 but an appeal hes from an order granting a probate and refusing the caveator to contest the grant on the ground that he had no locus stands-Nabin Chandra v Nibaran 59 Cal 1308 36 CWN 635 (637) AIR 1932 Cal 734 140 IC 54 Where in pursuance of an order of the High Court the Di trict Judge ordered the peti tioner to furnish security and the petitioner having offered certain properties the District Judge considered them sufficient and accepted them no appeal would he to the High Court at the in tance of the opposite party on the ground that the properties offered as security were insufficient-Lucas v Lucas 20 Cal 245 (246) No appeal lies from an order calling upon the executor to furnish security as it is not a final order but a mere interlocutory order-Monmohini v Taramoni AIR 1929 Cal 733 (734) Rangini v Debendra 8 CWN ceviii An order setting aside an order of dismissal for default of appearance is not appealable-Ngue Imon v Ma Po 6 Bur LT 87 20 I C 281

No appeal lies from an order refusing to amend a clerical error in the form of probate bit the High Court may deal with the case in revision under sec. 622 C P Code 1882 ( ec 115 C P Code, 1908) and set aside the order—Grundra V Rajestiani 27 Cal 5 No appeal lies from an order deciding that a person has locus stands to oppose a probate—Lakhi Narani V Multan Chand 16 C W N 1099 (1100) 15 I C 686 Monoranjani V Bipoy Kumari 90 I C 729 A I R 1926 Cal 180 but such an order is open to revision—Radha Ramani V Gopal 24 CWN 316 (317) 56 I C 122 No appeal lies against an order passed by the District Judge assigning a security bond under sec 292 but where the District Judge passes an order he has no authority to do the High Court may set aside the order in revision—Radinuddin v Meharui 39 Cal 563 (566) 16 C WN 66

15 CLJ 332 13 IC 690 (distinguished in U Po Hint v Maung Bo Gy: AIR 1929 Rang 109 cited in Note 345 ante)

Interlocutory orders -From the above cases it is apparent that the Calcutta High Court does not allow any appeal from an interlocutory order but only from a final order See Monmohim v Taramons supra But the Oudh Chief Court recognises no such distinction but allows an appeal against every order made by a District Judge under this Act whether an order has been passed in the course of an interlocutory proceeding or whether it is a final order Therefore an order of the District Judge fixing the fees of the auditor appointed to check the accounts submitted by the executor (under sec 317) and directing the fees to be paid by the executors is appealable-Chheda Lal v. Ram Dulani 7 OWN 616 AIR 1930 Oudh 424 (425) 127 IC 24 The Allahabad High Court holds that the word order in this section means an adjudication of the rights of the parties and a direction to be carried out by them it contemplates a final order and not an order of an interlocutory nature. So where an application for probate was made to a Judge within whose district the deceased had no fixed place of abode but only had an insignificant portion of his property and the Judge in his discretion under sec 271 did not refuse the application but proceeded with it held that there was no order but merely a finding as to whether he should hear the application or return it for presentation to another Court The so-called order of the Judge was not appealable-Bhupendra v Ashtabhuja 1932 ALJ 418 139 I C 156 A I R 1932 All 379 (380 381)

347 Appeal to Pruy Council—An order of the Recorder of Reporter of the Recorder of Reporter of the Recorder of Reporter is a final decree passed by the High Court in the exercise of original civil jurisdiction within the meaning of sec 595 of the C P Code of 1882 (sec 109 C P Code 1963) and is specialise If the estate is of value of Rs 10 000 and upwards the appeal hies to the Pruy Council and not to the High Court—Exool Hashim v Fatima 24 Cal 30 (33) But an order passed by the High Court on an appeal made to it under this section is final and not open to further appeal to the Pruy Council—Po Ain v Ma Sein 12 Bur L T 87 51 LC 596

Section 264 Act X of 1865 Section 87 Act V of 1881 Section 2 Act V of 1881 Section 2 Schedule I Act Act XXVIII

of 1920

300 (1) The High Court shall have concurrent jurisdiction of High Court the exercise of all the powers hereby conterred upon the District Judge

(2) Except in cases to which section 57 applies, no High Court, in exercise of the concurrent jurisdiction hereby conferred over any local area beyond the limits of the towns of Calcutta, Madias and Bombay, shall where the deceased is a Hindu, Muhammadan, Buddhist, Sikh, or Jaina or an exempted person receive applications for probate or letters of administration until the Provincial Government has, by a notification in the official Gazette, authorised it so to do

Note —The words and the province of Burma have been omitted by the Government of India (Adaptation of Laws) Order 1937

The word High Court in this section is not merely confined to the appellate jurisdiction of that Court but includes its original jurisdiction and under this section the High Court exercising its original jurisdiction has con current jurisdiction with the District Judge for the purpose of exercising the powers conferred by this Act-In the goods of Mahendra 5 CWN 377 So the High Court has jurisdiction to grant probate and letters of administration on the original side in any case which could have been brought before any District Judge and this section does not require that the property should be within the local limits of the High Court's original jurisdiction-Nagendrabala v Kashipati 37 Cal 224 (227 228) 5 I C 1003

Since the jurisdictions of the District Judge and the High Court are con current letters of administration would not be granted by the High Court if proceedings are already pending before the District Judge-Harris v Spencer 35 Bom L R 708 A I R, 1933 Bcm 370 (374)

Where a District Judge referred a probate proceeding to the High Court it was held that the District Judge's order on a probate application could not be referred to the High Court but that Court acting under the concurrent jurns diction conferred by this section treated the matter as an original application-In the goods of Monohur 5 Cal 756

The High Court may, on application made to it, Section 264 suspend, remove or discharge any pri- A Act X of vate executor or administrator, and Section 87A Removal of executor - or administrator and provision for successor vision for successor provide for the succession of another Act V of person to the office of any such executor or administrator Schedule I

who may cease to hold office, and the vesting in such Act XVIII successor of any property belonging to the estate

This section enacts sec 4 Administrator General's Act V of 1902 which Act reproduces the provisions of the English Judicial Trustees Act 1896 (59 & 60 Vict c 35) Prior to the Administrator General's Act 1902 the Courts in India had no power to remove an executor If the character of executor had ceased and he became merely a trustee he might be removed from his position as a trustee but if he continued to be executor he could not be removed from his position as executor See Ex parte Americand 29 Bom 188 7 Bom L R. 195 Under the present law much wider powers are conferred on Courts for the removal of an executor

- 348A Application under sec 301, if proper procedure for removal of trustees - Sec 301 of the Succession Act deals with the power of a High Court to suspend remove or discharge any private executor or administrator Where an application is made by the manager of a temple for the removal of a person who is in the position of a trustee of a permanent trust created for the temple by a will though styled an executor it certainly is not a matter which could be agstated by means of a petition under sec 301 of the Succession Act The proper procedure would be by proceedings under sec 92 C P Code-Maganlal v Samson Shalom 174 I C 890 A J R. 1938 All. 197
- Where a party seeks to restrain an executor from acting by the appointment of a receiver his remedy is by way of a regular suit. But where the remotal of an executor is sought and not merely an indirect restraint on him by getting the appointment of a receiver the only remedy that is open is under

sec 301-DI anabakkı3 ammal v Thangavclu 50 Mad 956 53 MLJ 644 A1R. 1927 Mad 994 (995) 105 JC 782

The use of the word reay in this action shows that the power vested in the Court is discretionary but this discretion is not arbitrary but is a judical discretion. It is not op n to a Court to dismiss the petition without any inquiry into the allegations made by the petitioner. But a proper case must be made out by the petitioner and the Court shall act only if proper cause is shown—thid

Section 264 B Act \(\lambda\) of 1865 Section 87B Act \(\forall
\) of 1881 Schedule I Act \(\lambda\) VIII of 1919 302 Where Directions to executor

or administrator

Where probate or letters of administration in respect of any estate has or have been granted under this Act the High Court may on application mide to it, give to

the executor of administrator any general or special directions in regard to the estate or in regard to the administration thereof

350 The power of giving directions to an executor or administrator is conferred upon the High Court no such power is given to the Distinct Court Winder see 269 the Distinct Judge has power to make orders with reference to the property under certain circumstances so long as no person has been appointed administrator or granted probate but he cannot do so after an administrator has been constituted—IV misor v Winsor 44 Bom 682 (685) 22 Bom L R 395 57 IC 116

The words any directions as regards the administration of the extate recent such directions as the executor may seek in order to administer the extate properly. This ection gives ample power to the High Court to settle questions arising between the executor and the fegatees them elves and also power to construe a will whenever the Court is asked to do so. But when a matter has been properly litigated in a Civil Court and has been adjudicated upon the High Court will be very reluctant to give directions which would in any way conflict with the judgment of the Civil Court already arrived at between the parties—1kkeyja v Lakshimamma 51 Mad 849 55 MLJ 517 41R, 1928 Mad 356 (358 359) 110 1C 186

So long as the administration lasts the procedure of making an application to the High Court for directions regarding the administration of the extate is available not only to the executor but also to a legatee or when such legate is dead to his representative. They need not be relegated to a suit—Secritory of State v Pariyat Deb 60 Call 1183 37 CW N 769 (790) A IR 1933 Cal 811

The power of giving directions to the executor or administrator for the sum disposal of certain disputes; is discretionary with the High Ceurt. If the matter is complexed and involves many questions of law and fact the proper tentidy is to bring a suit and not to make a petition under this section—drya Partitudhs Sobha v. Om Parkash 35 P.L.R. 307 A.I.R. 1934. Lah. 120. (121) 148. IC. (101)

### CHAPTER V

### Of Executors of their own Wrong

303 A person who intermeddles with the estate of Section 265 the deceased, or does any other act 1865 Executor of his own which belongs to the office of executor, wrong

while there is no rightful executor or administrator in existence, thereby makes himself an exe-

cutor of his own wrong

Exceptions -(1) Intermeddling with the goods of the deceased for the purpose of preserving them or providing for his funeral or for immediate necessities of his family or property, does not make an executor of his own wrong

(2) Dealing in the ordinary course of business with the goods of the deceased received from another does not make an executor of his own wrong

#### Illustrations

(1) A uses or gives away or sells some of the goods of the deceased or takes them to satisfy his own debt or legacy or receives payment of the debts of the deceased. He is an executor of his own wrong (ii) A having been appointed agent by the deceased in his lifetime to tollert his debts and sell his goods continues to do so after he has become aware of his death. He is an executor of his own wrong in respect of acts done after he has become aware of the death of the deceased.

(m) A sues as executor of the deceased not being such. He is an executor

351 Application of Chapter to Hindus -This section (and the next) of the Indian Succession Act 1865 was not reproduced in the Probate and Administration Act 1881 and so the framers of the Bill of the present Act added a section at the beginning of this chapter Nothing in this chapter shall apply when the deceased was a Hindu Muhammadan Buddhist Sikh or Jama or an exempted person But having regard to the numerous decisions to the contrary the Joint Committee omitted that section as this chapter enunciates general principles of law which suo vigore apply to Hindus and the other specified communities -- Report of the Joint Committee

For it was held in a large number of cases that the rules of English law relating to a person becoming an executor de son tart may be applied to Hindus on the principles of justice equity and good conscience masmuch as those rules are not repugnant to them-Radhika Mohan v A S Bonnersee 10 CWN 566 Narayanasamı v Esa Abbayı 28 Mad 351 (353) Magalurı Garudia v Nara yana 3 Mad 359 (363) Suddasook v Ramachandra 17 Cal 620 Prayag Kumarı v Sıta Prosad 42 CLJ 280 AIR 1926 Cal 1 (50) 93 IC 385 Ashitish Chandra v Radhika Mehan 35 Cal 276 (279) Rajah Parthasarathy v Rajah Venkatadrs 46 Mad 190 (232) 43 MLJ 486

352 Executor de son tort - If one who is neither executor nor administrator intermeddles with the goods of the deceased or does any other act characteristic of the office of executor he thereby makes himself what is called in the law an executor of his own wrong or more usually executor de son tort—Williams 11th Edn p 177

A very slight circumstance of intermeddling with the goods of the deceased will make a person executor de son tort. Thus it is said that milking the cows even by the widow of the deceased or taking a dog will constitute an executor de son tort So if a man kills the cattle or uses or gives away or sells any of the goods or if he takes the goods to satisfy his own debt or legacy or if the wife of the deceased takes more apparel than she is entitled to she will become executrix de son tort-Ibid Swinburne Part 4 s 23 Godolphin Part 2 c 8 s 1 Wentworth's Office of an Executor c 14 p 325 See Illus (1) If a mans servant sells the goods of the deceased as well after his death as before by the direction of the deceased given in his life time and pays the money arising there from into the hands of his master he makes the master as well as the servant executor de son tort-Padget v Priest 2 TR 97 The agent of an executor de son tort collecting the assets with the knowledge that they belong to the testa tor's estate and that his principal is not the legal personal representative may himself be treated as an executor de son tort-Sharland v Mildon 5 Hare 468 If a man sues as executor or if an action he brought against him as executor and he pleads in that character this will make him executor de son tort-Godolphin cited by Williams p 179 See Illus (iii) of this section

Under the English rules of law when the will is proved and administration granted and another person then intermeddles with the goods this shall not make him executor de son tort because there is another personal representative against whom the creditors can bring their action—Anonymous I Salk. 313 But this principle ought not to be applied to Hindus and so the fact that there is a legal representative of the deceased does not exempt a person who intermeddles from the liability which arises under this section—Narayanasami v Esa 28 Mad 351 (283)

There are many acts which a stranger may perform without being an execu tor de son tort such as locking up the goods for preservation directing the funeral in a manner which is suitable to the estate which is left, and defraying the expenses of such funeral himself or out of the deceased's effects making an inventory of his property feeding his cattle repairing his hou es or providing necessaries for his children-Williams p 181 See Exception (1) man takes the goods of the deceased and sells or gives them to me this shall charge him as executor of his own wrong but not me -Godolphin cited in Williams p 182 See Exception (2) If I take the goods of the deceased by mistake supposing them to be my own this will not make me executor of my own wrong - Ibid If a person sets up in himself a colourable title to the goods of the deceased though he may not be able to make out his title completely he shall not be deemed an executor de son tort-Flemings v Jarrat (1794) 1 Esp N P C 336 So also a man who possesses himself of the effects of the de ceased under the authority of and as agent for the rightful executor cannot be charged as executor de son tort-Hall v Ellit Peake N P C 87 A person who deals with the goods of a testator as agent of executors who afterwards prove the will cannot be treated as executor de son tott-Sykes v Sykes LR. 5 CP 113

The mere fact that a person did not profess to act as executor does not releve him from the hability because an executor de son tort rarely professes to act as such but if a person claims a title not derived from the testator but a paramount title he does not make himself hable as an executor de son torten.

Prayag Kumarı v Sıca Prasad 42 CLJ 280 AIR 1926 Cal 1 (51) 93 IC 385

353 Cases -Where on the death of the principal debtor his surety paid off debt which was due from the deceased to C but on the same day he carned away certain properties belonging to the deceased held that he became liable as executor de son tort-Naravanasams v Esa Abbay: 28 Mad 351 (353) An administrator pendente lite who intermeddles with the estate of a deceased person after he ceases to be administrator may be sued as executor de son tort-Ashitish Chandra : Radhika Mohan 35 Cal 276 (279 280) The bona fide purchaser for value from the deceased a representatives of a portion of the assets of the deceased person is not an executor de son tort and he should not be joined as a party in a suit against the personal representatives on a promissory note executed by the deccased-Seshayya v Subbasi 6 ML J 186 On the death of an undivided co-parcener the estate vests in the survivors and there is no estate belonging to a deceased person. The widow of a deceased undivided Hindu co-parcener by the fact of being in possession of the joint family estate does not become hable as an executrix de son tort as she has not intermeddled with any estate belonging to a deceased person-Ramasami v Vccrappa 33 Mad 423 (427) 20 MLJ 308 5 IC 362

A person can only be an executor de son tort as long as he intermeddles with the estate and his habilities last as long as he continues dealing with the

estate-Damodar v Dayal 11 Bom LR 1187 4 IC 283

304 When a person has so acted as to become an Section 266 his own wrong, he is act of the sown wrong answerable to the rightful executor or administrator, or to any creditor or legatee of the deceased, to the extent of the assets which

legatee of the deceased, to the extent of the assets which may have come to his hands after deducting payments made to the rightful executor or administrator, and payments made in due course of administration

Liability of executor de son tort -A person who takes possession of or intermeddles with the estate of a deceased person without being appointed an executor, is an executor de son tost and is liable both under the Indian and the English law There is no difference between the Indian and English law as far as this liability is concerned-Prayag Aumari v Siva Prasad 42 CLJ 280 AIR 1926 Cal 1 (52) 93 IC 385 Where a man has so acted as to become in law an executor de son tort he thereby renders himself liable not only to an action by the rightful executor or administrator but also to be sued as executor by a creditor of the deceased or by a legatee for the executor de son tort has all the liabilities though none of the privileges that belong to the character of executor-Williams 11th Edn p 184 Carmichael v Carmichael 2 Phill C C 103 Narayanasamı v Esa Abbayı 28 Mad 251 (354) The credi tors may bring an ordinary suit for recovery of their debts against the executor de son tort as representing the estate it is not necessary for them to bring an administration suit-Narayanasams v Esa Abbays supra An executor de son tort who has taken possession of all the assets of the deceased can be sued by a legatee without joining the legal representatives but where the executor de son tort has taken possession of only a part of the estate and administration is sought for the entire estate the legal representatives would also have to be addedRayah Parthasaratha v Rayah Venkatadra 46 Mad 190 (234 235) But though an executor de son tort cannot by his own wrongful act acquire any benefit yether is protected in all acts not for his own benefit which a rightful executor mad to And accordingly if he pleads properly he is not hable beyond the extent of the goods which he has administered—Godolphin cited in Williams p 186. There fore in an action by a creditor of the deceased under a plea of plene administration the executor de son tort stabilitation in the case of the same of the same to the his hands—Williams p 186. The hability of the executor de son tort extend to the amount of the assets received but where he has mingled this with his own so as to make it impossible to distinguish the one from the other the Court may for lack of evidence treat the whole as available to make restitution—Magalari v Narayana 3 Mad 399 If a person suing the executor de son tort has shown that some property has passed into his hands the extent to which such property received being peculiarly within his knowledge the executor de son tort is bound to show that he has not received enough to statify the debt—Ibid

If the rightful executor or administrator brings an action of trover or trespass the executor de son tort may in mitigation of damages give evidence of the payments made by him in the rightful course of administration on the ground that these payments were such as the lawful executor or administrator would have been bound to make and therefore it cannot be considered as any detri ment to him that they were made by an executor de son tort-Mountford v Gibson 4 East 451 454 Padget v Priest 2 TR 100 Fyson v Chambers 9 M & W 468 Thus where the brother of the deceased person becomes possessed of the deceased's property but is subsequently dispossessed by a suit by the deceased's widow and in the interval the brother has paid out of his own monies a decree obtained against himself and the widow for a debt due by the deceased the brother is entitled to recover the money so paid from the widow -Kanakamma v Venkataratnam 7 Mad 586 If the executor de son tort has admittedly realised the rents and profits of the estate and claims to have spent a large amount in the up-keep and maintenance of the property payment of taxes and effecting improvements of a permanent nature it is obviously necessary to take an account to determine what amount if any is due from the wrongful executor to the estate and the rightful administrator is entitled to bring a suit for account.-Robson v. Administrator General. 30 PLR 503 AIR 1929 Lah 753 (757)

But an administrator de son fort cannot retain any portion of the assets of the deceased in payment of a debt to himself — An executor de son tort cannot specially pl ad a retainer for his own debt for otherwise the creditors of the deceased would be running a race to take possession of his goods without taking administration to him ——Williams on Executors 11th Edn pp 186 187

Section 304 is not controlled by sec 212 on the other hand it should be read as a proviso to sec 212. And therefore sec 212 would not be a bar to a suit if it is covered by sec 304. In other words an executor de son tort can be used by an heir or a creditor of the deceased even though no letters of administration have been taken out by the plaintiff—Ratanbas v. Narayandas 51 Bom 771 29 Bom LR 900 A IR 1927 Bom 474 (475)

An executor de son tot may be sued by the rightful executor or administrator or by a creditor or legatee for the recovery of his claim but one executor de son tot cannot sue another such person nor can he enforce any claim against the estate without taking out administration—Franți v. Adain 18 Bom. 337 (341)

his representative

#### CHAPTER VI

# OI THE POWERS OF AN EXECUTOR OR ADMINISTRATOR

An executor or administrator has the same Section 267 power to sue in respect of all causes 1865 In respect of causes of action surviving de ceased and rents due at of action that survive the deceased, and Section 88 may exercise the same power for the Act V of death recovery of debts as the deceased had when living

The wording of section 88 of the Act of 1881 has been followed. It is more in consonance with the language of the Indian draftsman and involves no change of substance -Notes on Clauses

All demands whatsoever and all rights to prose-Section 268 cute or defend any action or special Act X of Demands and rights of action of or against de proceeding existing in favour of or Section 89 ceased survive to and against executor or ad against a person at the time of his Act V of decease, survive to and against his munistrator

executors or administrators, except causes of action for defamation, assault, as defined in the Indian Penal Code, or other personal injuries not causing the death of the party, and except also cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory

#### Illustrations

- (i) A collision takes place on a railway in consequence of some neglect or default of an official and a passenger is severely hurt but not so as to cause death He afterwards dies without having brought any action. The cause of action does (a) A sues for divorce A dies The cause of action does not survive to
- 354A Meaning of 'executors or administrators' -The words executors or administrators in sec. 300 of the Succession Act mean persons who are appointed by the Court to administer the estate of a deceased person in the absence of a will or persons nominated by the testator in his will to administer

his estate. Those words are not sufficiently wide to include or embrace heirs representing the estate-Official Liquidators v Jugal Aishore 1938 ALJ 1002 1938 A.WR (HC.) 741

Special proceeding ... The phrase special proceeding in sec. 306 of the Succession Act is an extremely wide one and there is nothing in the section to suggest that it must be a proceeding analogous to a suit but even if such a construction has to be given misfeasance proceedings under sec 235 of the Companies Act can be held to be proceedings in the nature of a suit. In any way special proceeding is wide enough to cover summary proceeding under sec 235 of the Companies Act-Official Liquidators v Jugal Kishore 1938 ALJ 1002 1938 A.WR (HC) 741

What action, survive to the executor -With respect to such personal actions as are founded upon any obligations, contract debt covenant or other duty the general rule has been established from the earliest times that the right of action on which the testator or intestate might have sued in his lifetime survivas his death and is transmitted to his executor or administrator. Therefore it is clear that an executor or administrator shall have actions to recover debts of every description due to the deceased either debts of record as judgments, statutes recognizances or debts due on special contracts as for right or on bonds covenants and the like under scal; or debts on simple contracts as notes unscaled and promises not in writing either express or implied—Williams on Executors, 11th Edin p 606; Wentworths Office of Executor 14th Edin p 150

The ancient common law rule active personalis monitur cum persona (personal actions die auth the person) no longer holds good and now an executor or administrator shall have the same actions for injury done to the personal estate of the deceased in his lifetime whereby it has become less beneficial to the executor or administrator as the deceased himself might have had—whilmsm p 609. The maxim active personalis moritur cum persona has always been considered as an unfair and even boristrorius maxim especially when applied to a case where the injured party is denied redress because the wrongdoer died. I may add that it seems to me to be based upon no principle of justice equity and of good conscience and that the technical common law rules as to forms of action and the distinction between real and personal actions might have had much to do with its survival' in modern days—per Sadasius Ayyar J in

The right to sue for damages for negligence survives against the administraction of the deceased wrong door—Bhupendra v Chandramoni 53 Cal 987 100 IC 286 A1R 1927 Cal 277 (278)

Rustompt v Nurse 44 Mad 357 (369) (FB)

The right of pre emption of a Mahomedan survives on his death to his executions or administrators—Sajsad Jiaul v Sitaram 36 Bom 144 (146) 13 Bom L R 1040 12 I C 720

To whom the cause of action survives ....The cause of action survives on against the executors or administrators and not to or against the heirs of the deceased. Unless the heirs take out administration to the estate of the deceased person to whom the cause of action accrued they cannot sue on the cause of action under this section—Soyad Itaul v Sitaram supra Arishma Behari v Corporation of Calcutta 31 Cal 993 (999) Mariadi v Samnoji 31 MLI 772 O MLT 303 88 1C 823 (825)

356 'Personal mjuries'—A suit for damages for malicious prosect tion survives upon the plaintiff's death to his executors and administrators. Such a suit does not fall under the category of personal mjuries. The expression personal mjuries is to be read as ejusdem generis with the word preceding it vit assault Reading the words in their ordinary and natural sense they appear to refer only to physical mjuries and do not include injuries caused by malicious prosecution—Arishna Behari v Corporation of Calcutta 31 Cal 993 (998 999) 8 C W N 745 (reversing Arishna Behari v Corporation of Calcutta 31 Cal 400)

But the other High Courts take the contrary view. Thus the Madras High Court holds that such a suit does not survive to the executors because the words personal injuries do not mean bodily injuries only but include injuries episdem generis with both defarmation and assault and therefore include injuries such as those caused by malitical prosecution—Maruadi v Samnayi 31 MLI J 772 20 MLT 303 38 1C 823 (826 827) Rustomyi Ninise 44 Mad. 357 (379 380) (FB) The Patna and Bombay High Courts hiewsee hold that such a cause of

action does not survive—Punjab Singh v Ram Autar 4 PL J 676 (679) 52 1C 348 Motilal v Harnarayan 47 Bom. 716 (717) A1R 1923 Bom 408 25 BomLR 435 and the same view is taken by the Allahabad High Court— Mahtab v Hub Lal 48 All 630 24 AL J 795 A1R 1926 All 610 (612) 98 1C 590 and by the Nagpur J C Court—Ration Chandra v Municipal Committee 27 NLR 237 A1R 1931 Nag 9 (10)

357 What actions do not survive —Actions for torts to the person do survive to the testator Therefore an executor or administrator shall not have actions for assault battery, false imprisonment hibel slander or decent for such causes of action die with the testator—Williams p 610 Th.is an executor or administrator cannot maintain any action for libel done to the deceased—Hatchard v Mege 18 QBD 771 If the plaintiff in a suit for libel having failed to obtain a decree in the trial Court eeks to obtain a decree for damages in the Court of Appeal and dies during the pendency of the appeal the appeal abates—Maricali v Sammai 31 MLJ 772 38 IC 823 (825) Where the cause of action is an injury to the person the personal representatives cannot maintain an action merely because the person so injured incurred in his lifetime some expenditure of money in consequence of the personal injury—Pulling v Great Eastern Ry Co (1882) 2 QBD 110 112 Palomappa v Raja of Ramnad 49 Mad 208 A1R 1926 Mad 233 92 IC 366 Ratan Chand v Municipal Committee 27 NLR 237 A1R Nag 9 (10)

But an action is maintainable by the executor against any person causing the deeple of the deceased. See the section and compare secs. I and 2 of the (English) Fatal Accidents Act 1846 (9 & 10 Vict. C 93) and the Indian Fatal Accidents Act VIII of 1855. In a suit for damages against the defendant who through his negligence caused the death of the plaintiffs shubsand if the defendant dies during the suit the action survives against the defendant sexecutors and administrators—Balasubramaniam v Roditgues of ML J 146 AIR 1934 Mad 507 (503). Where a suit for damages is brought against a person under the Fatal Accidents Act it can be continued having regard to sec 300 against the legal representatives of the defendant—Balasubramaniam v, Marain 87 Mad 951.

Breach of quasi contract by deceased —A remedy for a wrongful act which is not a mere tort but a breach of a quasi contract done by a deceased person can be pursued against his legal representatives where property belonging to another person has been appropriated by the deceased and added to his estate Such an action is not one excluded by sec 306—Peoples Bank of Northern India v Hargopal 17 Lah 262 38 P.L.R. 256 A.I.R. 1938 Lah 268, 162 I.C. 204

Effect of death after decree —The maxim actio personals moniture cum persona applies only where the death of the plaintiff or the detendant takes place before any decree is obtained in the suit. In such a case the suit abates. The rule is that personal actions so long as they remain unconverted into decrees abate on death—Maricali v Saminas supra. See also Ramchode v Ruhmany 28 Miad. 487. Haridas v Ramidas 13 Bom. 677 and Subramania v Venkata ramies? 31 LC 4 (cases under the Legal Representatives Suits Act. VII of 1855). But if the plaintiff sued the defendant and obtained a decree to recover damages for libel or malicious prosecution and the defendant presented an appeal but ded before the henring his legal representative was entitled to prosecute the appeal—Gopal v Ramchandra 26 Bom. 597. 4 Bom L.R. 325. Paramén v Sundanaraja 26 Mad. 499.

Where a portion of the claim against the wrong doer was decreed against him and the rest of the claim discussed and the wrong doer appealed and the

plaintiff put in cross objections and then during the pendency of the appeal either party died the appeal could be continued by his legal representative but the cross objections abated—Bhim San v Muhammad 4i: 11 Lah 1 A IR 1292 Lah 807 31 PLR 134 120 IC 9, Gulabrao v Deorao 149 IC 1079 AIR 1934 Nae 19 (120)

358 C. immal prosecutions —This section has no application to criminal prosecutions. The words proceeding in groceding of a nature similar to a suit—Hazara v Croun 2 Lah 27 (31) A I R. 1922 Lah 227. SI I C. 918 (dissenting from Ishar Das v Emp 10 P R. 1908 7 Cr L. J. 290 where it was held that the principle underlying this section was applicable to a criminal prosecution for defamation having regard to the narrowness of line between a prosecution and a suit for damages for defamation and therefore a prosecution for defamation terminated on the death of the complainant). The Madras High Court also is of opinion that this section has no reference to criminal prosecutions but to civil actions only. The word prosecute which occurs in the section implies no connection with criminal proceedings but is used in the same sense as in ces 14 and 16 of the Limitation Act. The use of the term causes of action a phrase unknown to the criminal law is clearly indicative of the scope of the ection—Md Ibrahim v Shaik Daigond 44 Mad 417 (419) 65 I C. 549 A I R. 1921 Mad 228.

But this does not mean that the right to institute criminal prosecutions abates with the death of the complainant or the persons injured. The right to take criminal proceedings is common to any person cognizant of the commission of the offence and does not exist merely in favour of the person injuniously affected by the offence—Md Ibrahim v Sh Davood supra Ha ara v Croun supra Croun v Manu Din A Lah 7 (9) 24 Cr L I 29 A IR 1924 Lah 72

Section 269 Act \ of 1865 Section 90 Act V of 1881

fit

307 (1) Subject to the provisions of sub-section

Power of executor or (2), an executor or administrator has
administrator to dispose of property

deceased, vested in him under section

211. either wholly or in part, in such manner as he may think

#### Mustrations

(t) The deceased has made a specified bequest of part of his property. The executor not having assented to the bequest sells the subject of it. This sale is valid.

(ii) The executor in the exercise of his discretion mortgages a part of the immoveable estate of the deceased. The mortgage is valid

(2) If the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, the general power conferred by sub-section (1) shall be subject to the following restrictions and conditions, namely—

(i) The power of an executor to dispose of immove able property so vested in him is subject to any restriction which may be imposed in this behalf by the will appointing him, unless probate has been granted to him and the Court

which granted the probate permits him by an order in writing, notwithstanding the restriction, to dispose of any immoveable property specified in the order in a manner permitted by the order

(11) An administrator may not, without the previous permission of the Court by which the letters

of administration were granted,---

(a) mortgage, charge or transfet by sale, gift, exchange or otherwise any immoveable property for the time being vested in him under section 211, or

(b) lease any such property for a term exceeding

five years

- (111) A disposal of property by an executor or admimistrator in contravention of clause (1) or clause (11), as the case may be, is voidable at the instance of any other person interested in the property
- (3) Before any probate or letters of administration is or are granted in such a case, there shall be endoised thereon or anneved thereto a copy of sub section (1) and clauses (1) and (11) of sub-section (2), or of sub-section (1) and clauses (1) and (11) of sub-section (2), as the case may be
- (4) A probate or letters of administration shall not be rendered invalid by reason of the endorsement or annexure required by sub-section (3) not having been made thereon or attached thereto, nor shall the absence of such an endorsement or annexure authorise an executor or administrator to act otherwise than in accordance with the provisions of this section
  - At The Make provisions for the powers of an administrator and deal with the powers of an administrator and deal with the powers of the administrator as such and in no way govern the powers of persons with life or absolute estates. It is not correct to hold that a widow having a life estate under a will has no power to alenate the property but that a daughter having an absolute estate has such powers as given her by the Succession Act. The daughter as an administrator is limited to the powers granted to her under the Act but her powers as having an absolute estate would be different. The same has to be said of a widow—Manki huar v. Hansia Singh 173 CD 983 AIR 1738 Pat. 201
  - 319 Sub section (1)—Power of executor —This section does not mean that an executor must be clothed with a probate of the will before he can dispose of any property of the testator —The title of the executor is derived.

from the will and not from the probate the definition of executor in sec. 2 (c) does not suggest that probate is any part of his title. Consequently it is impossible to hold that unless probate is obtained the executor has no power of disposal at all—Verikatasubbamma v. Ramayya. 55 Mad. 443 (PC) 62 MLJ. 365. 36 C.W. 411 (145). 365 1C. 111. A.R. 1832 (PC). 92

This sub-section makes no difference between moveable and immo eable property-Scale v Brown 1 All 710 (FB) Under this sub-section the executors have power to dispose of the property of the deceased in any manner they think fit Thus they can bind the estate of the deceased by creating a mortgage-Ma Sein & Chetty Firm 3 Rang, 443 AIR 1926 Rang 10 91 IC 663 See Ill (n) They can mortgage the property and give to the mortgages a power of sale-Scale v Brown 1 All 710 (FB) But though the executor can dispose of the property in such manner as he thinks fit he must be able to give reason for doing so He cannot transfer the property if there is no necessity for the transfer at all-Penheno v Joindra 28 CLJ 141 47 IC 289 (290) The validity of a transaction entered into by the executor must be judged by the test whether the transaction was reasonably necessary for the due administration of the estate Thus a lease for 99 years with an option to the lesses to purchase the reversion in the demised premises or any part thereof during the same period was set aside as it was not necessary for the due administration of the estate-Mahomed Hussein v Bas Ashaba 34 Rom L.R. 1365 A.I.R. 1932 Bom (606) Jusmohandas v Pallonsee 22 Born 1

360 Position of nurchaser or mortgages -If there is no restric tion imposed by the will on the power of the executor as contemplated by sub section (2) (1) but on the other hand the will gives him the power of dealing with the property the executor's power to deal with the property by sale mort gage or any other way he pleases is absolute. Consequently in such cases a purchaser from a Hindu executor is not bound to see the exact amount of debts which the testator had directed the executor to pay or even to inquire if any such debts actually existed he need not look further than the will itself-Rootfoll v Mohima Churn 10 BLR 271 (N) An executor has authority to sell or mortgage the property of the testator in due course of administration and give a complete title free from the charge or trust to the purchaser or mort grape. Such a purchaser or mortgages is not therefore bound to enquire whether the legacies charged on his estate by the testator had been paid and he must be presumed to have acquired a valid title unless it is clearly proved that he had express or constructive notice that certain other persons had claims against the estate and the executor was acting in breach of the trust-Sooleman v Rahim tulla 6 Bom LR 800 A mortgagee from an executor is not bound to inquire whether the executor is mortgaging the estate for the proper purpose of administration unless there are special circumstances to put him on inquiry. The mort gagee is entitled to a decree against the estate unless he had notice that the executor was exceeding his powers or had been put to inquiry or had reason to suspect that anything vas wrong-Umamoji v Janaki Ba'lav 1 I C 248 (249 250) (Cal) No duty is cast upon the purchaser from the executor to enquire whether there are any debts of the testator or to enquire into the necessity of the loan or to see to the application of the money. Greender v. Mackintosh 4 Cal 897 Ahronee v Ahmed 33 Bom L R 1056 A I R 1931 Bom 533 (537) It is of great consequence that no rule should be laid down here which may impede executors in their administration or render their disposition of the testa tor's effects unsafe or uncertain to a purchaser. His title is complete by sale and delivery What becomes of the price is of no concern to him. This ob ervation

applies equally to mortgages or pledges —Scott v. Tyler 2 Dick 725 (per Lord Thurlow)

Where the executor deals with the property for purposes not strictly binding on as to defect the bona fide alience who had no notice of the fact that the executor was using his powers for purposes not binding on the estate. But an alience unit notice of the fact that the executor was using his powers for his own purposes will not be protected—Namberumal v Vecraperumal 59 M L J 586 A IR 1830 Mad 586 (989) 128 I C 689 Where the person to whom the executor collusively passes the property Linous that the executor is acting in violation of his trust and in fraud of the persons interested in the due administration of the assets, the fruid vituales the transaction and the transfer in oid—Doe v Fallous 2 Cr & Jer 481 If a mortgage or piedgee has actual notice that there are no debts and no reason is assigned for the mortgage he will not be safe in lending—Re Verrell [1903] 1 Ch 65

If there is a restriction imposed on the power of the executor eg if the will distinctly states that there is to be no sale and no alienation other than an alienation for the payment of debts the purchaser or mortgagee is not absolved from inquiry. In such a case it is the duty of the purchaser to inquire as to the existence of those debts, but it is not necessary as a condition precedent to the validity of the transaction that the purchaser or mortgagee should make out the real existence of the necessity for raising the mone; If there is a clear representation by the executors that they are selling the property to clear the debts and habilities of the estate that is a prima facte evidence as to necessity for the sale. It is an admission by the Hundu executor as to the object and necessity for which the money is being raised. Such a recital is a prima facte evidence in favour of the purchaser and it is salficient to shift the onus on the other side to show that there was no necessity for the ale—Sarat Chandra v. Bhupendra 25 Cal. 103 (106 108). following Hunoomanpersaud v. Babooee Municaj Koon naree 6 MIA 333 (419).

In the case of a transfer by the executor one starts with the presumption that the transfere is valid qua the transfere until and unless it is established that the transferee had notice that the executor was acting in breach of the trust. But a transferee who deals with a transferor not as executor but as suner although the transferor is an executor is not entitled to the protection which the law affords to transferees from executors—Gectarance v Narendra 60 Cal 394 144 IC 137 AIR 1933 Cal 429 (430 432).

- 360A Sub section (2) —The several clauses of sub section (2) apply where the deceased was a Hindu Buddinst etc. If the letters of administration were granted to the estate of a deceased who was supposed to be a Confucian and not a Buddinst will section (2) did not apply, but the case was governed by sub section (1) and the fact that after the grant the deceased was found to be a Buddinst did not make sub section (2) applicable Consequently no permission of the Court is necessary under clause (1) of sub section (2) to enable the administrator to sell a property of the deceased—Lee Lim Ma Heef- v. Saw Mah Hone 2 Rang 4 (14) 79 IG 729 A IR 1924 Rang 221
- 361 Clause (1)—Power given by Will—Restrictions—The powers of an executor under the will are far wider than the powers of an administrator and the executor can do whatever is not expressly foliabled by the will—Ramdhon v Sharjudd n 9 Bur L T 236 34 I C 128 (129) The clause applies to all Hindus including Hindus usefulos. Therefore a Hindu widow who was

appointed an executrix would be entitled to sell as executrix the property left by her husband if no restriction was imposed on her powers of disposing of the property by the will which appointed her executrix. The sale of the property should therefore be deemed to be a sale by the widow as the executrix of the testator—Mithibas v. Meherbas. 46 Bom. 162 (170). 23 Bom.L.R. 858. AIR. 1922. Bom. 176. 64 LC. 3072.

A power given to the executor to sell the property generally carries with it a power to martgage the property Thus where the will gave the executor power to sell the property to pay off debts incurred by me or if the property was a losing concern the executor had power to mortgage the property in case of necessity there being no prohibition in the will against the executor mortgaging the property -Purna Chandra v Nobin Chandra 8 CWN 362 (364) Eastern Mortgage and Agency Co v Rebats Aumar 3 CL J 260 (266) Parthasarathy v Mukund ammal 45 Mad 867 (870) 68 IC 856 AIR 1923 Mad 84 Naras anasu ami v Ramaswam: 54 M L J 677 A I R 1928 Mad 817 109 I C 97 A will ran as In order to pay off my debts, the executors shall sell, mortgage or pledge my properties If they desire to sell the immoveable properties to purchase Held that the more profitable properties they shall be competent to do so words of the will were not meant as a limitation on the power of the executors and that they were competent to mortgage the testator's properties for purchasing other properties-Rajam v Ramanath 3 CWN 483 (484) But where a testator who had mortgaged some of his properties died leaving a will to the effect that in order to pay off my debts the executor shall either sell the whole or a portion of my estate or make any other settlement of the estate such as batm or day bather etc. and shall pay off my debts from the consideration money thus accoursed it was held that the executor had no power to mortgage the estate of the testator. The object of the testator was to disembarrass the property from the mortgage already effected the mode of doing so was specified to be the liquidation of the mortgage by sale or demise of such part of the property as would allow the rest of the property to be free from the mortgage. It was impossible to suppose that the testator intended that in order to get rid of the embarrassment of the property caused by one mortgage the estate would be further embarrassed by another mortgage-hants Chandra v Aristo Churn 3 CWN 515 (516 517)

Where the two documents constituting the will of the testator show that the testator intended that his nebts were to be paid the mere fact that the direction with regard to the payment of the debts appears in one document relating to a particular property does not lead to the inference that the testator intended to impose any restriction on the executor to alienate the other property of the testator. So also the mere fact that the testator intended that the property shall not be divided till his minor sons attained the age of 21 does not give rise to the inference that he intended to impose any restriction on the power of the executor-Ahronee v Ahmed Omer 33 Bom LR 1056 AIR 1931 Bom 533 (536 537) Where the testator gave to his executrix the power of sale or mort gage in order to make gifts for charitable and religious purposes for the benefit of her soul to the temple at V and on other auspicious or mauspicious occasions, held that these words amounted to a restriction and that the executrix had only a limited power of sale for the special purposes which the will had specified-Shit Behanlalji v Bai Rajbai 23 Bom 342 (348) The use of such directory expressions in a will as you are to pay my share of the expenses, whatever they may be does not yest in the executors such an absolute discretion that they may spend the whole and deprive the beneficiary of any beneficial interest in the estateNistarum v. Nundo Lal. 30 Cal. 369. 7 CWN 353. Where by a will the testator directed that the executor should for the purposes of securing the payment of a legacy execute a mortgage of the property in favour of the Official Trustee of Bengal and the executor mortgaged it to one of his co executors. held that the mortgage was invalid not being in accordance with the terms of the will and the co executor was not entitled to enforce the mortgage—Vaughan v. Hescline 1 All. 753.

Where there is a discretion given to the executors to sell but it is given for the purpose of enabling the executors who are also appointed trustees to change the investment for the benefit of the trust and the property in its new form is to be held subject to the same trusts as the property in its original form it cannot be said that there is any restriction on the powers of the executors to dispose of the properties—In the goods of Nundo Lall Mullick 23 Cal 908 (911) Where the position of a person under a will is not merely that of an executor but that of a residuray legatee as well the restrictions imposed on him by the will in regard to alienations are invalid and he may alienate the property treating the restrictions as non existent or inoperative—Jagobandhu v Dwarika 23 Cal 446 (449)

An executor may dispose of immoveable property without obtaining a grant of probate—Sir Mahomed Yusuf v Hargovandas 47 Bom 231 (237) 24 Bom LR 753 AIR 1922 Bom 392 see also Ganapath v Swamalas 36 Mad 575

A person taking a mortgage of immoveable property covered by a will from executors has no duty to inquire into facts outside the will immediately prior to the testators death in order to ascertain whether by reason of those facts the statutory power of disposal possessed by executors under sec 307 had in any way been restricted—Suml Ahmar v Sist Kumar 4 C WN 289 (PC)

In respect of a Muhammadan will the entire property of the testator vests in executors (sec 211) although the testator can dispose of only one third of his property by will Consequently the executor can sell the entire estate of the deceased—Aimminista v Sirdar Ali 29 Bom.L R 434 102 IC 129 A IR 1927 Bom 387 (391) Sir Mahomed Yusii v Hargovandas supra Ahronee v Ahmed Omer 33 Bom.L R 1056 A IR. 1931 Bom 533 (537) But the executor can do so (ie can sell the entire property) only before the two thirds of the assets (to which the heirs are entitled) have been ascertained—Sir Mahomed Yusii V Hargovandas 47 Bom 231 (241)

An Administrator General who becomes the administrator of the estate by virtue of a deed of transfer executed by the executors of the will of the deceased under ec 31 of the Administrator Generals Act (II of 1874) acquires the powers of disposition which the original executors possessed under the present section— In the goods of Nundo Lall Mullick 23 Cal 908 (910)

If a will appoints the Administrator General as the executor and directs the executor to manage the estate through the Court of Wards (the legatees being minors) it does not create any restriction on the power of the executor because the Court of Wards Act gives full power to the Court of Wards of selling or disposing of the property—In the goods of Indra Chandra Singh 23 Cal 580 (589)

Court may remove restrictions:—It is open to a testator to impose restrictions upon the powers and discretion of an executor and if in practice such restrictions prove injurious to the actual administration of the estate it is equally open to the executor to apply to the Court for suitable directions—Eastern Mortgage and Agency Co v. Rebair 3 CL.J 260 and the Court which granted the probate is empowered by this section, notwithstanding the restriction to permit the executor

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A power given to the executor to sell the property generally carries with it a power to mortgage the property Thus where the will gave the executor power to sell the property to pay off debts incurred by me or if the property was a losing concern the executor had power to mortgage the property in case of necessity there being no prohibition in the will against the executor mortgaring the property -Purna Chandra v Nobin Chandra 8 CWN 362 (364) Eastern Mortgage and Agency Co v Rebats Aumar 3 CLJ 260 (266) Parthasarathy v Mukund ammal 45 Mad 867 (870) 68 IC 856 AIR 1923 Mad 84 Narayanasuami v. Ramaswams 54 M.L.I. 677 A.I.R. 1928 Mad 817 109 I.C. 47 A will ran as In order to pay off my debts the executors shall sell mortgage or pledge my properties. If they desire to sell the immoveable properties to purchase more profitable properties they shall be competent to do so words of the will were not meant as a limitation on the power of the executors and that they were competent to mortgage the testator's properties for purchasing other properties-Rayan v Ramanath 3 CWN 483 (484) But where a testator who had mortgaged some of his properties died leaving a will to the effect that in order to pay off my debts the executor shall either sell the whole or a portion of my estate or make any other settlement of the estate such as balm of day bains etc. and shall pay off my debts from the consideration money thus accounted it was held that the executor had no power to mortrage the estate of the testator. The object of the testator was to disembarrass the property from the mortgage already effected the mode of doing so was specified to be the liquidation of the mortgage by sale or demise of such part of the property as would allow the rest of the property to be free from the mortgage. It was impossible to suppose that the testator intended that in order to get rid of the embarrassment of the property caused by one mortgage the estate would be further embarrassed by another mortgage-Kants Chandra v Kristo Churn 3 CWN 515 (516 517)

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Where there is a discretion given to the executors to sell but it is given for the purpose of enabling the executions who are also appointed trustees to change the investment for the benefit of the trust and the property in its original form it to be held subject to the same trusts as the property in its original form it cannot be said that there is any restriction on the powers of the executors to dispose of the properties—In the goods of Nundo Lali Mullick 23 Cal 908 (911). Where the position of a person under a will is not merely that of an executor but that of a residuary legatee as well the restrictions imposed on him by the will in regard to alienations are invalid and he may alienate the property treating the restrictions as non existent or inoperative—Jagobandhu v Duranka 23 Cal 466 (449)

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In respect of a Muhammadan will the entire property of the testator vests in the executors (sec 211) although the testator can dispose of only one third of his property by will Consequently, the executor can sell the entire estate of the deceased—Azimumnissa v Sindar Ali 29 Bom L R. 434 102 I C 129 A I R 1927 Bom 387 (391) Sir Mahomed Yusuf v Hargovandas supra Ahronee v Ahmed Omer 33 Bom L R. 1056 A I R. 1931 Bom 533 (537) But the executor can do so (ie can sell the entire property) only before the two thirds of the assets (to which the heirs are entitled) have been ascertained—Sir Mahomed Yusuf v Hargovandas 47 Bom 231 (241)

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Court may remote restrictions —It is open to a testator to impose restrictions upon the powers and discretion of an executor and if in practice such restrictions prove injurious to the actual administration of the estate it is equally open to the executor to apply to the Court for suitable directions—Eastern Mortgage and Agency Co Nebut 3 CLJ 200 and the Court which granted the probate is empowered by this section, notwithstanding the restriction, to permit the executor

by an order in writing to dispose of any immoveable property specified in the order in the manner permitted by the order—Azimuniussa v Sirdar Ali 29 Bom. LR 131 AIR 1927 Bom 387 (332).

This section does not make an executor's powers to dispose of the property of the deceased dependent upon the permission of the Court except where any restriction is imposed by the will. If there is no restriction the Court has no jurisdiction to intervene in the matter—In the goods of Nundo Lall Millick 23 Cal. 908 (911). This section does not give the Court power to intervene in the administration of the estate in the hands of the executor axe so far as to judge whether under the circumstances brought before it it may seem right that he should have power under the Courts order to act in contravention of a restriction imposed in the will by disposing of any immoveable property in the manner permitted by the order. If there is no such restriction imposed by the will the Court has no power to give any direction e.g. as to what it shall be lawful for the executor to do in the course of administration. If any such unnecessary direction is given by the Court it will be set aside by the High Court in appeal—In the goods of Indra Chandra Singh. 23 Cal. 580 (590).

The permission to remove restrictions cannot be invoked by persons other than the executor. It is not a legitimate use of the provisions of this clause to allow any of the persons interested in the will other than the executor to come in perhaps at a great cost of the estate and under the form of seeking for the executor a permission for which he has not asked to institute what are practically proceedings in administration—blud (at p. 591).

A sale of property by the executor in due course of administration and under the order of Court confers a good title on the purchaser and this title is not affected by a subsequent mortgage of the property by a residuary legate because the residuary legatee is to share in the ultimate residue which may remain after any disposition which has been or may be made in due course of administration—Mommetho v Puram Chand 29 CWN 539 (546 547) 88 IC 33 AIR 1924 Cal 703 following Chutterput v Moharaj Bahadur 32 Cal 198 (PC)

Power of sale in mortgage —This section does not apply where the executor is a mortgage (or the transferee of a mortgage) of the testators property and he sells the property under a power of sale conferred by the mortgage deed. This power is independent of and uncontrolled by this section—Azimumissa V strdar Als 29 Bom LR 434 A IR 1927 Bom 387 (394) 102 IC 129

An administrator has no power to dispose of the property without the express p rmission of the Court. If a universal legate e g window takes our letters of administration with the will annexed to the estate of the deceased she must obtain the permission of the District Judge to any mortgage executed by her and cannot profess to mortgage the property in her capacity as universal legatee.

Praying v Goukaran 6 C W N 787 (791) In this respect there is no distinction between the powers of an administrative who happens to be the heiress of her husband and those of any other administrator—Chun Lal v Makshada 23 C W N 652 (653) 52 I C 309 The principle is that if the heiress to the deceased s property takes out letters of administration the estate vests in her not as heiress but as administrativa and if she sells any portion of the estate during the course of administration and before the administration is completed her sale would be that of an administrativa and if made without the leave of the Court, will be avoided at the instance of a person interested—Ma Ne

v On Hnut 7 LBR. 93 22 IC 925 (926), A L A R Furm v Moung Thue 1 Bur L J 133 AIR. 1923 Rang 69 (70)

But after the administration is completed ie when all the debts have been paid and there is nothing left to administer no permission of the Court is necessary to an alienation made by the administrator-In re estate of Indrans 53 All 422 A I R 1931 All 212 (214) 130 I C 498 The permission can be granted by the Court only for the purpose of administration and not where the estate has been fully administered and there are no debts or legacies to be paid. So where after the administration was at an end the widow who had obtained letters of administration applied for leave to mortgage certain properties of her deceased husband held that after the administration was at an end she remained in possession of the properties not as administrative but as herress and as such she could sell or mortgage the properties without the leave of the Court (so far as she could do it as a Hindu widow)-In the goods of Nursing 3 CWN 635 (636) Lakshmt Narain v Nanda Rani 9 CLJ 116 (118) 3 IC 287 (288) But it cannot be said that any order granting permission to the administrator to sell any property after the administration is completed is a nullity At most it may be said that no such order is appropriate or necessary but it does not follow that the order is void outright and without jurisdic Therefore the sale in pursuance of the order is not invalid and the purchaser is safeguarded-Ahetra Mohan v Nalim Bala 36 CWN 744 (745 746) 55 CLJ 535 AIR 1932 Cal 828

Permission to sell immoveable property should be given after the fullest inquiry and only when the debts and other charges on the estate cannot be paid without selling the property. The fact that an e tate can be wound upconveniently by distributing the sale proceeds among the heirs is no ground for granting permission to sell-E S Aboo v E E Moolla 11 Bur LT 155 49 IC 302 Before granting permission the Judge should inquire into the truth of the allegations made by the applicant and should satisfy himself that the sale is necessary and in the interests of the estate as a whole-Haji Pu v Tin Tin 2 Rang 117 (120) AIR 1924 Rang 237 80 IC 746 It is not desirable that permission should be granted to sell immoveable properties not in the possession of the administrator to some of which third parties claim an absolute title and other of which were subject to ostensible incumbrances unless it was proved that other properties not the subject of contention were unavail able for sale-Hajs Pu v Tin Tin 2 Rang 117 (120) If the sanction of the District Judge to an application is obtained by fraud and misrepresentation of facts on an ex parte application it is void and inoperative and the purchasers who are found not to be bona fide purchasers are not entitled to maintain their purchases though they were not parties to the fraud-Mohesh Chandra v Gossain Ganpat 23 CWN 401 (417 418) 51 IC 884

The Court competent to grant the permission is the District Court by which the administrator was appointed. But if at that time a suit for the administration of the estate is pending before the Chief Court it is not the District Court but the Chief Court that should give the permission. But if there is a special rule of practice of the Chief Court recognising the power of the District Court to grant permission under such circumstances, then of course the District Court can grant the permission—Ma Chit v. National Bank 30 C.W.N. 769 (PC.) 9 1 IC. 432 A.I.R. 1925 PC. 261 (263)

When the permission of the Court has been obtained the administrator is strictly bound by its terms. A permission to self does not include a permission to mortgage so where after obtaining an order for sale the administrator by an order in writing to dispose of any unmoveable property specified in the order in the manner permitted by the order—Azimunnissa v Sirdar Ali 29 Bom LR 434 Ali R 1927 Bom 337 (392).

This section does not make an executor's powers to dispose of the property of the deceased dependent upon the permission of the Court except where any restriction is imposed by the will. If there is no restriction the Court has no jurisdiction to intervene in the matter—In the goods of Nundo Lall Mullick 23 Cal. 908 (911). This section does not give the Court power to intervene in the administration of the estate in the hands of the executor are so far as to judge whether under the circumstances brought before it it may seem right that he should have power under the Courts order to act in contravention of a restriction imposed in the will by disposing of any immoveable property in the manner permitted by the order. If there is no such restriction imposed by the will the Court has no power to give any direction e.g. as to what it shall be lawful for the executor to do in the course of administration. If any such unnecessary direction is given by the Court it will be set aside by the High Court in appeal—In the goods of Indra Chandra Singh. 23 Cal. 580 (590).

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A sale of property by the executor in due course of administration and under the order of Court confers a good title on the purchaser and this title is not affected by a subsequent mortgage of the property by a residuary legatee because the residuary legatee is to share in the ultimate residue which may remain after any disposition which has been or may be made in due course of administration—Monmotho v Puran Chand 29 CWN 539 (546 547) 88 IC 33 AIR 1924 Cal 703 following Chutterput v Moharaj Bahadur 32 Cal 198 (PC)

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362 Clause (11)—Permission of Court to administrator—An administrator has no power to dispose of the property without the express p rmis ion of the Court. If a universal legate eg whow takes out leiters of administration with the will anneed to the estate of the deceased she must obtain the permission of the District Judge to any mortgage executed by her and cannot profess to mortgage the property in her capacity as universal legate—Prayag v Goukaram 6 CWN 787 (791). In this respect there is no distinction between the powers of an administrative who happens to be the heriess of her husband and those of any other administrative Minh happens to be the heriess of her husband and those of any other administrative—Chain Lai v Makshada 23 CWN 652 (653) 52 IC 309. The principle is that if the hieress to the deceased a property takes out letters of administration the estate vests in her not as heriess but as administrative and if she sells any portion of the estate during the course of administrativa and if she sells any portion of the estate during the course of administrativa and if made without the leave of the Court will be avoided at the instance of a person miterested—Ma Me of the Court will be avoided at the mistance of a person miterested—Ma Me

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Permission to sell immoveable property should be given after the fullest inquiry and only when the debts and other charges on the estate cannot be paid without selling the property. The fact that an extate can be wound upconveniently by distributing the sale proceeds among the heirs is no ground for granting permission to sell-E S Aboo v E E Moolla 11 Bur L T 155 49 IC 302 Before granting permission the Judge should inquire into the truth of the allegations made by the applicant and should satisfy himself that the sale is necessary and in the interests of the estate as a whole-Hap Pu v Tin Tin 2 Rang 117 (120) AIR 1924 Rang 237 80 IC 746 It is not desirable that permission should be granted to sell immoveable properties not in the possession of the administrator to some of which third parties claim an absolute title and other of which were subject to ostensible incumbrances unless it was proved that other properties not the subject of contention were unavail able for sale-Han Pu v Tin Tin 2 Rang 117 (120) If the sanction of the District Judge to an application is obtained by fraud and misrepresentation of facts on an ex parte application it is void and inoperative and the purchasers who are found not to be bona fide purchasers are not entitled to maintain their purchases though they were not parties to the fraud-Wohesh Chandra v Gossam Ganpat 23 CWN 401 (417 418) 51 IC 884

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The Court competent to grant the permission is the District Court by which the administrator was appointed But if at that time a suit for the administration of the estate is pending before the Chief Court it is not the District Court but the Chief Court that should give the permission But if there is a pecul rule of practice of the Chief Court recognising the power of the District Court to grant permission under such circumstances, then of course the District Court can grant the permission—Ala Chie v National Bank 30 C W N 769 (TC) 9 IT C 432 A1R 1925 PC 261 (263)

When the permission of the Court has been obtained the administrator is strictly bound by its terms. A permission to self does not include a permission to mortigage so where after obtaining an order for sale the administrator

THE INDIAN SUCCESSION ACT mortgages the property the transaction is voidable—N N Cheltyar v Tan Ma Pu 6 Rang 111 A IR 1929 Rang 5 (6) Randhon v Shariudan 9 Bur LT 236 34 IC 128 (129) A permission granted to the administrator to sell the property does not entitle him to mortgage the property at a high rate ISEC 307 sent one property ones not connecting than to managed the property at a night interest and for a larger amount than the estimated value of the property on interests and for a larger infloring than the estimated value of the property Chandi Ayal v Abdul Karim 51 Born 16 ATR 1927 Born 49 (50) 98 I C 915 The sanction of the Court should be taken in respect of all the cessential elements of a mortgage transaction including the provision for pay executate recurring or a managage transaction including the provision for pay ment of inferest. Where the principal amount only was mentioned in the appliment of interest. Where the principal amount only was manifolice in the appropriate actually executed the administrator. tation to sanction out in the narrisons actuary executes the auminimitation of the stipulated to pay compound interest at 30 per cent with half yearly rests the Court reduced it to simple interest at 9 per cent and directed that the interest Court reduced it to support interest at 3 per tent and interest unit into interest should be added to the mortgage money—Salaya v Jadunath 19 CWN 240

If a Hindu widos who has been appointed administrative mortgage cer tain properties with the sanction of the Court the person lending the money need not inquire into the legal necessities of the mortgage. If he bong fide need not inquire miss are again necessaries of the morrisage at ne owns note relied upon the order granting permission and made the advance, there is no onus on him to go and make inquires as to the truth of the allegations on onus on num to go ano make inspures as to the truth of the anggations on which the sanction was given. To chillenge such a transaction it has to be which the sanction was given at changing such a transaction it has to be shown that the person who got the sanction knew that the facts were false or superior was the person who got the sainting above that the was instrumental in getting the order from the Court upon false representations. that me was instrumental in getting the order from the court upon laise rep. sentations—Annada v Atul 23 CWN 1045 (1046) 31 CLJ 3 54 IC 197

The validity of an order of the District Judge granting permission to an administrator to sell property cannot be challenged in any collateral proceeding actinitistici to seu property cannot de chanengeu in any conaterat proceedings of an an appeal in Land Acquisition proceedings started 28 years after— Chum Lal v Makshada 23 CWN 602 (654) 52 IC 309

Clause (m) Voidable A sale by the administrator without the permission of the Court is hable to be avoided in such a case the law the permission of the court is name to be abouted in south a case the case of a bona fide purchaser for value—Ma Me y. makes no exception in the case of a bond face parchaser for value—flat its 1. A compromise of a suit by an On state / Lik 30 22 1 L 320 (320) A compromise of a suit by an administrator under the terms of which he agrees to execute a darpatm lease 18 auministrator under the terms of which he agrees to execute a corporar lease in my aid as the lease requires the sanction of the Court under this section. invalid as the lease requires the sanction of the Court under this section—
Sarbesh v Handoyal 14 CWN 451 11 CLJ 346 5 IC 236 A lease by an administrator for more than five years is not void but only voidable at the an auministrator for name main over years is law your out only yourself as unitatince of any person interested in the property. As between the lessor and the Instance of any person inferested in the property as detucen the sessor and the lessee it is good—Subhadra v Chandra Kumar 8 CWN 51 A nortgage by lessee it is good Nonuora v Changra Aumur a CW iv 38 A montgage op some executors without the permission of the Court is good as between them some executors without the permission of the Court is good as between them and the mortgages. It is voidable at the instance of other persons interested and the mortgagee it is voicaose at the instance or other persons interested but they can avoid it on the principle of he who seeks equity inust do equity. but they can avoid it on the punciple or the who seems equity must on equity that is they can avoid the mortgage only on making restriction to the extent that is they can avoid the mortgage only on making restitution to the extent to which the estate was benefited by the mortgage. Eathern Mortgage and do which the estate was benefined by the analyzage—datiern viorigage and Affency Co v Rebatt 3 CLJ 250 (268) Zollikofer & Co v Chettyar Firm 9 Agency Co v Kebali 3 U.J. 2001 (2023) Louisofer & Uo v Chetifor Firm 9
Rang 34 AIR 1931 Rang 277 (279) 131 IC 730 The person who 18 entitled to avoid the transaction ought not to be allowed to do so in such a manner as to enable him to recover the property which would otherwise be lost manner as to ensure man to recover one property waters would otherwise use rost to him and at the same time to keep the money or other advantage which to mm and at the same time to seep the money or other advantage which he has obtained under it—Chant Changle v kalash 13 CLJ 447 10 IC ne nis oriantea univer it—Laura Chomara v Admusa 13 CLJ 44/ 10 1C 259 (270) Stasundari v Barada 28 CWN 444 (445) A IR 1924 Cal 636

The transfer is not void ab unitio but voidable only and if the persons the transfer is not vone or oneso out voneage only one in the persons interested do not bring a suit to set aside the transfer within the period of

limitation the sale becomes binding on them-A L A Firm v Maung Thue 1 Bur L J 133 A I R 1923 Rang 69 (70) It is not necessary that the person interested should bring a suit as plaintiff to avoid the transfer. The invalidity of the transaction can be pleaded as a defence in a suit. Thus where the administrator mortgaged the property without the permission of the Court it was open to the beneficiary to plead in a suit brought by the mortgagee to enforce the mortgage that the mortgage was void for want of the Court's sanction-Chands Ayal v Abdul Karım 51 Bom 16 28 Bom LR 1360 A I R 1927 Bom 49 (50) 98 IC 915 Jaibas v Renaram AIR 1927 Nag 57 98 IC 6

#### Person interested -See notes under sec 263 364

A disposal of the property by the administrator in contravention of the rule stated in clause (1) or (11) is voidable only at the instance of the persons interested in the property. In other words if any objection is to be made to the conveyance of the property that objection must proceed either from the heirs of the deceased or the heirs of the beneficiaries recognized as such in the will-Midnapore Zemindary Co v Ram Lanai 5 Pat 80 7 PLT 188 91 IC 169 AIR 1926 Pat 130 (134) A creditor of the deceased is a person interested because he has an interest in all the estate of the deceased and is entitled to look to that estate to satisfy his claim and consequently an adminis trator disposing of the property vested in him without the permission of the Court cannot defeat the claims of the creditor-Laxmidas v Ismail 28 Bom LR 1262 AIR 1927 Born, 16 99 IC 482 Ma Ne v On Hnut 7 LBR 93 22 I C 925 Even the fact that the purchaser has re sold the property to a third party will not defeat the creditor's right unless he loses that right by un reasonable delay in taking action-Ma Ne v On Hnit supra The words any other person in this clause mean any person interested in the property independently of the executor whose alienation he seeks to avoid-Jagabandhu v Dwarska 23 Cal 446 (450) So a person deriving interest as creditor of the executor in his personal capacity and not as creditor of the estate of the testator is not entitled to avoid an alienation made by the executor-Ibid

An executor or administrator may, in addition Section 269 to, and not in derogation of, any other 1865 powers of expenditure lawfully exer-Section 90A Act V of General powers of ad ministration cisable by him, incur expenditure-

(a) on such acts as may be necessary for the proper Schedule I Act XVIII care or management of any property belong- of 1919 ing to any estate administered by him, and

(b) with the sanction of the High Court, on such religious, charitable and other objects, and on such improvements, as may be reasonable and proper in the case of such property

364A Power to carry on business of testator -Where the assets of the testator consisted of a banking business which was of a hazardous character and without any capital and the will contained no direction to the executors to carry on the business and the order of the District Judge permitted them to carry on the business only for the purpose of realisation of the assets

of the business but the executors without taking any direction from the Judge continued the business for a considerable period (e.g. 7 years) with borrowed money it was held that they were personally liable for the debts and had no general right to indominity out of the estate—Sudhir Chandra v Bassesuan 35 C.L.J. 46 69 IC 798 A IR 1921 Cal. 419 (420 421)

For other cases bearing on the power of the executor to borrow money for the purposes of the estate see Ramanath v Kanat Lel 7 CWN 104, Debendra v Radhika 31 Cal 253 8 CWN 135 Sudhir Chandra v Gobinda 21 CWN 1043 Mannatra Chandra v Sudhir Kristina 35 CWN 850

364B Payments in due course of administration—To the execute to which payments of valid debts of the deceased are made proportionately to the assets available the payments are made in due course of administration. But where certain creditors are paid more than the rateable share due to them having regard to the claims of other creditors who are not paid at all to that extent the payments are not in due course of administration and the executors de son tort are liable to be required to refund the excess—Penubola v Autha Ramah A IR 1939 Mad 662

Section 269 B Act X of 1865 Section 90B Act V of 1881 Schedule I Act XVIII of 1919 309 An executor or administrator shall not be entitled to receive or retain any commission or agency charges at a higher rate than that for the time being fixed in respect of the Administrator General by or under the

Administrator General's Act, 1913

310 If any executor or administrator purchases,

Section 270 Act X of 1865 Section 91 Act V of 1881 Purchase by executor of administrator purchases, either directly or indirectly, any part of the property of the deceased, the sale is voidable at the instance of any other person interested in the property sold

365 An executor cannot be allowed either immediately or by means of a trustee to be the purchaser from himself of any part of the assets but shall be considered a trustee for the persons interested in the estate and shall account for the utmost extent of advantage made by him of the subject so purchased -Hall v Hallett 1 Cox 134 Watson v Toone 6 Maddock 153 An executor is bound to do everything in his power for the estate and is therefore absolutely precluded from buying the assets irrespective of undervalue or otherwise because he may be thereby induced to neglect his duty-Re Boles and British Land Co [1902] 1 Ch 244 246 But the position is somewhat different where an executor or administrator purchases the interest of a legatee The executor stands in the position of a trustee and the legatee in the position of a cestur que trust There is no rule of law that a trustee shall not buy trust property from a cestus que trust but the Court of Equity will examine the transaction will ascertain the value that was paid by the trustee and will throw upon him the onus of proving that he paid full value and that all information was laid before the cestus que trust when it was sold-Barada Prosad \ Gajendra 13 CWN 557 (565) 1 IC 289 In this case the purchase at an execution sale of a legatee's interest by the administratrix durants minoritate was upheld as not made in contravention of this section

When there are several executors or administra- Section 271 Act X of tors, the powers of all may, in the 1865 Powers of several exe absence of any direction to the con-Section 92, cutors or administrators exercisable by one trary be exercised by any one of them 1881 who has proved the will or taken out administration

### Illustrations

(1) One of several executors has power to release a debt due to the deceased

(11) One has power to surrender a lease (m) One has power to sell the property of the deceased whether moveable or immoveable

(10) One has power to assent to a legacy
(10) One has power to endorse a promisory note payable to the deceased
(10) The will appoints A B C and D to be executors and directs that two
of them shall be a quorum No act can be done by a single executor

Co executors, Co administrators - Co executors however numerous are regarded in law as an individual person and by consequence the acts of any one of them in respect of the administration of the effects are deemed to be acts of all for they have all a joint and entire authority over the whole property-Williams 11th Edn p 708 Wentworth's Office of Executor 14th Edn pp 206 213 And the law is the same in case of administrators -Willand v Fenn cited in 2 Ves Sen 267

The words several executors are to be interpreted in their ordinary sense and mean a number of executors they do not mean executors possessing powers to act severally -Alamuri Sitaramasuami v Venkata Rashavacharvulu 42 M.L.I. 559 AIR, 1922 Mad 214 (215) 67 IC 104

The powers of executors may be exercised by any one of them who has proted the util Therefore a suit cannot be carried on by one alone of several executors without his first taking out probate-Shaik Moosa v Shaik Essa 8 Born, 241 The effect of this section is this that where several executors obtain probate and the will directs them all to act together none of them can act singly but if one of several executors has obtained probate alone by reason of the others having renounced or refused to accept office he who has obtained probate can act singly because the others who have renounced or refused to act must be treated as if they had never been appointed-Satya Prashad v Motital 27 Cal 683 (688) Where probate was granted to all the seven executors appointed by the will all of whom were directed to act together. but three of them afterwards died and their places were not filled up three executors brought the suit and the remaining executor who refused to join in the suit was made a defendant it was held that the suit was competent-Hemangini v Sarat Sundari 34 CLJ 457 AIR 1921 Cal 292 (295) 66 IC. 882 Soudamins v. Tentram 51 I.C. 753 (756) (Cal.) Where probate of a will was granted to two executors and one of them sued for rent and as his co-executor (who resided out of the juri-diction of the Court) could not be made a co-plaintiff he was joined as defendant held that there was no defect in the frame of the suit on the ground that the two executors did not both join as plaintiffs-Soundamini v Tentram 54 IC 753 (756) (Cal.)

In the absence of a direction to the contrary in the will two out of three executors, who have obtained probate are competent to renew a barred debt-Alamun Silaran aswami . Venkala Raghavael aryulu 42 MLJ 559 MR 1922 Mad. 214 (215) 67 I C 104

Where there are several administrators the powers of all may be exercised by any one of them who has taken out administration. Consequently where one administrator acts on behalf of the other administrators and fully represents the estate a decree passed against him and against the estate represented by him is perfectly valid though the administrator in charge might be liable to the legatess for the breaches of duty and for gross negligence resulting in loss to the estate. An auction sale held in execution of such a decree is valid and binding on the estate. Rhodes v Padminisha 1 LW 1003 26 1C 369 (374). Where in the will there was a provision that one of the two executors might perform all the functions of both a mortgage by one of the two executors was valid.—Narayanasuami v Ramasuami 54 MLJ 677 AIR 1928 Mad 817 109 IC 47

One of several executors who alone has obtained probate can give a valid discharge under this section for a debt due to the deceased but this can only be when the debt subsists as a debt due to the deceased and not when it has merged into decree in jai our of the executors. Therefore one of several executors alone cannot give a valid discharge for the whole amount of a joint decree passed in favour of all the executors. In this respect there is no distinction between decree holders who are executors and other decree holders-Lachman Das v Chaturbhus 28 All 252 (255) Where the executors invested money in a mortgage the endorsement on the mortgage bond by one executor as to a part payment made by the mortgagor would not amount to a discharge This is not a case governed by the present section. This section applies to property which (as the English lawyers say) rests in the executor virtute officer It is the property that hes vested in him as executor that this section applies to In the present case the right under the mortgage bond notwith standing that the money did in fact form a part of the estate of the deceased did not yest in the executors as such but yested in them under and by virtue of the bond which was given to them by the mortgagor. The executors were in the position of joint creditors and the endorsement or receipt by one was not sufficient to give a valid discharge to the debtor-Chandra Mohan v Satva Kribal 29 I C 139 (140)

Section 272 Act X of 1865 Section 93 Act V of 1881 Survival of powers on death of one or more of several exederated of one of several executors or administrators, in the absence of any direction to the contrary in the will or grant of letters of administration, all the powers of the office become vested in

administration, all the powers of the office decome vested if the survivors or survivor

The words in the absence administration which occur in section of the Act of 1881 have been adopted as they appear to state the law more accurately --Notes on Clauses

367 The power of two or more executors is not determined by the death one for the whole survives to the other or others—Finders v Clarke 3 Ath, 509 And so likewase if administration has been granted to two and one dies the other will be the sole administrator and all the powers of the office will survive to him—Hudson v Hudson Cas. Temp Talb 127 See also notes under sec. 226

Powers of administra tor of effects unadminis tered

same powers as the original executor Section 94
Act V of or administrator

368 By the grant of administration de bonis non the administrator becomes the only personal representative of the original deceased and with respect to the estate left unadministered by the former executor or administra tor he has the same power and authority as the original representative for he succeeds to all the legal rights which belonged to the former executor or admimistrator in his representative character-Catherwood v Chabaud 1 B & C 154 (per Bayley I)

314 An administrator during minority has all the Section 274 Powers of administra powers of an ordinary administrator tor during minority

Section 95

368A The principle of this section applies to an administrator appointed Act V of under section 246 for the use and benefit of a person of unsound mind The 1881 fact that this Act contains a provision in Section 314 about the powers of an administrator during minority but contains no provision about the powers of an administrator during lunary should not lead to the inference that this omission is intentional and is meant to limit the powers of the latter kind of administrator The omission is merely accidental and an administrator appointed under sec 246 during the lunacy of the legatee has all the powers of an ordinary administrator like an administrator appointed during minority-Bonny v Edwards 12 OC 390 4 IC 781 (784)

See also notes under secs 244 and 246

When a grant of probate or letters of adminis- Section 275 tration has been made to a married 1865 Powers of marned executrix or administra woman, she has all the powers of an Section 96 trix

ordinary executor or administrator

## CHAPTER VII

OI THE POWERS OF AN EXECUTOR OR ADMINISTRATOR

368B Executors are bound to carry out the directions of the will. It is very unseemly on their part to obtain probate of a will and then instead of acting as the ministers of the will of the testator turn against his wishes and speak of them in a disrespectful manner. If the executors consider them selves so much wiser and better than the pious, old fashioned and ignorant testator as they call him they should have declined to obtain probate of his will and renounced the executorship-Balkrishna v Vinayak 34 Bom.L.R. 113 139 I C. 594 A.I R 1932 Bom. 191 (192) The only way in which the directions of the testator may be varied is by the cy pres doctrine. It is applied where from lapse of time and change of circumstances it is no longer possible bene ficially to apply the property left by the testator in the exact way in which

317

he has directed it to be applied and it can then be applied beneficially to similar purposes by different means—Ibid In re Campden Chanties (1881) 18 Ch D 310

Section 276 Act \ of 1865 Section 97 Act V of 1881 As to deceased s funeral funeral ceremonies of the deceased m a manner suitable to his condition, if he has left property sufficient for the purpose

(1) An executor or administrator shall, within

The wording of sec 97 of the Act of 1881 has been followed as it is more suitable to the wider scope of the consolidated Bill and involves no change of substance—Notes on Clauses

Section 277 Act X of 1865 Section 98 Act V of 1881 Secs. 7 15 Act VI of 1889

sn months from the grant of probate or letters of administration, or within such further time as the Court which granted the probate or letters may appoint, exhibit in that Court an inventory containing a full and true estimate of all the property in possession, and all the credits and also all the debts owing by any person to which the executor or administrator is entitled in that character, and shall in like manner, within one year from the grant or within such further time as the said Court may appoint, exhibit an account of the estate, showing the assets which have come

- to his hands and the manner in which they have been applied or disposed of (2) The High Court may prescribe the form in which an inventory or account under this section is to be exhibited
- (3) If an executor or administrator, on being required by the Court to exhibit an inventory or account under this section, intentionally omits to comply with the requisition, he shall be deemed to have committed an offence under section 176 of the Indian Penal Code
- (4) The exhibition of an intentionally false inventory or account under this section shall be deemed to be an offence under section 193 of that Code
- 369 Inventory —The most essential thing in the inventory is a full and true estimate of all the property in the possession of the executor or administrator. Moreover the inventory should be embodied in one document Massing together a variety of documents some of which are in another case will not do. So also a mere list of moveable and immoveable properties a list without a single figure and containing nothing in the nature of a full and true estimate of the property in possession is not an inventory which satisfies the requirements of this section—Bhubanishuani v. Collector of Gaya. 41 Cal. 556 (567) (P.C.) 18 C.W.N. 153

370 Account —The executor or administrator is bound to render accounts. A provision in a will that the executor shall not be hable to render accounts does not exempt him from the obligation of exhibiting to the Court of Probate the accounts of the estate required by this section—Pean Lal v Bepin 63 IC 336

The words an account mean one account and not a series of accounts The provisions of this section mean that one account is to be exhibited the Court cannot go on from time to time directing the executors to deliver periodical or annual accounts-Mohesh Chandra v Biswanath 25 Cal 250 Chandra humar v Prasanna 48 Cal 1051 (1056) 25 CWN 977 (It should be noted that the words from time to time which occurred in the old sections before the word appoint have been omitted from the present section obviously because they gave rise to the misapprehension that the Judge could demand accounts from time to time as often as he thought fit) This section contemplates the submission of one initial inventory and one final account after the completion of administration and does not warrant an order requiring a series of yearly accounts. Orders providing for the future administration of the trust and making provisions for effecting repairs and directing that further accounts should be submitted half yearly to the Court are outside the scope of this section-Notandas v Kishnibai 12 SLR 27 47 IC 750 (751) Hemandas v Chellaram 9 SLR 134 32 IC 554 (655) Jagat Durlabh v Indu Bhusan 44 IC 58 The words within such further time as the Court may appoint in the second part of clause (1) empower the Judge only to extend the time for filing the accounts of the first year and are not intended to enable the Judge to order further accounts for subsequent year-Sarat Sundars v. Uma Prasad 31 Cal. 628 (639). Even the fact that the testator enjoined on his executor to prepare accounts annually does not enlarge the Judge's power and empower him to exact an account annually although it would authorise a person interested to take action against the executor This section does not give the Judge a power to call for a revised account if an account has already been filed as required by this ection and has been accepted as prime face true but if it appears that the account is materially untrue the Judge may take action under clause (4). When once an account has been filed and accepted shortly after the expiry of a year from the grant of probate the Judge has no power to call for further accounts of subsequent years-Sarat Sundars v Uma Prasad 31 Cal 628 (637 638) 8 CWN 578 Hemandas v Chellaram 9 SLR 134 32 IC 554 (556) The account should be filed within one year from the grant. If the executor or administrator is not able to file the account within one year he may obtain an extension of time from the Court But the fact that the time has been extended does not enlarge the cope of the account se does not require an account for a longer period. The account required to be exhibited whether it is exhibited within one year or thereafter is the account contemplated by the second sentence of clause (1)-Chandra Kumar v Prasanna 48 Cal 1051 (1056) 25 C W.N 977

Under this section the District Judge has no power to institute a judicial mquiry into the inventory and account or to appoint an auditor at the expense of the executor or administrator. All that the Judge has to do under this section is to see that the inventory and account prima face satisfy the requirements of the section is e that the inventory appears on inspection to be a full and true estimate of all the property credits and debts and that the account on in pection appears really to be a true one showing the assets and their disposal—Sand Sundan v. Uma Prasad supra, Hemandas v. Chellatam supra, Chileda

Lal v Kam Dulan 7 OWN 616 A I R 1930 Outh 421 (126) 127 I C 24 To ascertain this the inventory and account should be passed under some examination by the Judges staff so as to detect material mistakes or omissons. If such were detected the papers would not satisfy this section, and for this purpose the section empowers the Judge to extend the time to the executor or administrator to amend the account—Sarat Sundan v Uma Prasad 31 Cal 628 (636 637) 8 C WN 578 Chieda Lal v Ram Dulant supra

After the accounts have been submitted by the executor and have obviously been passed by the Coart it has no jurisdiction to order the executor to produce the funds in his hands in Court for the purpose of investment or for any other purpose and an order imposing a fine upon the executor for failure to comply with the order of production of the money is equally without jurisdiction—
Abutter Mohan v Saronom 12 CL J 602 8 IC 1103 (1103)

This section does not make it obligatory on the Court to require an executor or administrator to exhibit an inventory or account. Clause (1) imposes the duty on the executor or administrator If he does not do so the Court may require him to do it but it is in its discretion—Mooila Cassim v. Mooila Abdul 9 Bur LT 18 83 5 IC 9-0 (9a)

An executor who has not proved the will may call upon the executors who have proved the will to exhibit an inventory and account and file the same in Court—Jehneur y Bai kurbba 27 Bom 281

A legated of a person interested in the administration has a right to inspect the accounts of the executors. If a legate is denied inspection or is not satisfied with the result of his inspection he may file an administration suit and ask for administration by the Court—Hemandas v. Chellaram 9 SLR 134, 32 IC 554 (556).

It is the Court that has jurisdiction to grant the probate that has jurisdiction to demand an inventory. That jurisdiction cannot be said to have been taken away because by bifurcation of the district the properties dealt with by the probate lie within the jurisdiction of another district—Subramaniyan v Ramanuarui 31 IC 499 [500]

Where the will appoints a person as executor and at the same time appoints him as trustee of the property after the work of the executor is finished the rendering of accounts under this section by him as executor only does not exonerate him from the liability to render accounts showing how he has dealt with the property of his on sharers of which he is in possession as trustee and the co-sharers are entitled to bring a suit against him for such accounts—Mohamed Renu x Sohida 23 CWN 658 (660) 94 IC 128

The mere fact that accounts have been filed in the Probate Court or even the fact that accounts have been passed does not absolve the administrator from his habilities for any particular sim of money misappropriated by him. He may be either sued in the ordinary way for such sum or he may be criminally prosecuted for an offence under sec 406 I P Code—Krishna Lal v Emp. 33 CLJ 252 22 Cr.L.J 295 60 IC 791 (783)

370A Executor, if need submit account only for 'one' year —
Where no extension of time is obtained by an application made within one year
of the grant of probate the Probate Court is entitled to call for and the executor
must submit accounts up to the data on which it is submitted or up to the date
on which a person interested applies for an order directing submission of accounts
however long the period may be It was so decided in the case of Hindal
Chaktavetry y Irban Aumar Chaktaratiry 43 CWN 784, where the contention

of the appellants was that under sec 317 of the Indian Succession Act they were only bound to file account for one year only and not for about twenty one years which was the direction of the Court below. The learned Judges of the High Court in dealing with the point observed in the judgment as follows - The case seem to be a case of first impression and although the point was raised in the case of Sarat Sundan Barmant v Uma Prasad Roy Chowdhury 31 Cal 628 8 CWN 578 it was not decided in that case This section (meaning see 317) does not say for what period the account is to be filed in the Probate Court. It only specifies the time within which the executor is to file his account in the Probate Court. It has been held in construing sec. 98 of the Probate and Administration Act and ec 317 of the Succession Act which has replaced that section that the Probate Court can require only one account to be filed in it It cannot make an order on the executor to file accounts for successive periods. The position therefore is this that masmuch as an executor is required by this section to file his account only once within one year he will fulfil the condition of the section if he files his account say just on the expiry of the 8th month from the date of the grant. The Probate Court has to accept the same because it was filed within a year of the grant and after having accepted it the Probate Court cannot require the executor to file another set of accounts for the remaining period of four months to make up a year. There is therefore no warrant for saving that the account which the executor is to file under sec 317 must be the account for one year. The case where an executor does not file his account within a year but makes an application for time to file his accounts for one year of the grant and only the time for filing such an account is extended stands on a different footing. If the application is granted by an order of the Court he has to file account for one year and not for a further period although the date of filing according to the extension granted by the Court may be more than a year after the grant This is so because that was his prayer which was granted by the Court In our judgment the last portion of paragraph (1) of sec 317 of the Indian Succession Act gives ome indication. For that portion of the section indicates what must be the contents of the accounts. It says that the accounts must show not only the assets which had come to the hands of the executor but it must show the manner in which they have been applied or disposed of The accounts therefore must be a complete one up to the date when it is filed in Court and it must give the Probate Court an idea of the condition of the testator's estate in the hands of the executor up to date when he files his accounts

371 Sub section (4) —The protection afforded to parties interested in the will is that if the inventory and the accounts are intentionally false in any particular the executor or administrator makes himself highly to pumshment under the Indian Penal Code. The other remedy open to the interested parties is to file an action against the executor or administrator questioning the correct ness of the accounts—Bar Panbas v Monary 29 Bom LR 683 ATR 1927 Bom. 438 (439) 106 IC 24 Chheda Lal v Ram Dudars 7 OWN 616 ATR. 1830 Oudh 424 (425) 127 IC 24 There is also a third remedy the to apply for revocation of the grant of probate or letters of administration under sec. 263 clause (c)

The Judge should not order the prosecution of a person for omission to file the accounts, or for filing false accounts without an inquiry whether the omission was intentional or the accounts filed were intentionally false—Vara Chandra v. Tripura Charan 2 CW N 597 Quaere whether the Judge can call upon the executor to file accounts after the probate has been revoked—Table.

318

A Act X of 1865 Section 99 Act V of 1881 cases Section 16 Act VI of 1889 Section 2 (7) Act VIII of

1903

Section 277

In all cases where a grant has been made of Inventory to include

probate or letters of administration intended to have effect throughout the property an any part of British India in certain whole of British India, the executor

or administrator shall include in the inventory of the effects of the deceased all his moveable and immoveable property situate in British India, and the value of such property situate in each province shall be separately stated in such inventory, and the probate or letters of administration shall be chargeable with a fee corresponding to the entire amount or value of the property affected thereby wheresoever situate within British India Section 278 The executor or administrator shall collect, with

Act λ of As to property of and 1865 Section 100 Act V of 1881

the deceased and the debts that were debts owing to deceas due to him at the time of his death It is incumbent on the executor or administrator to avail himself of his authority with reasonable diligence in the collection of the effects of the Therefore if by unduly delaying to bring an action he has enabled a

reasonable diligence, the property of

debtor of the deceased to avail himself of the Statute of Limitations the executor or administrator will be personally liable-Hayward v. Ainsey 12 Mad 573 320 Funeral expenses to a reasonable amount, according to the degree and quality of Expenses to be paid the deceased, and death-bed charges, before all debts including fees for medical attendance,

Act V of

and board and lodging for one month previous to his death, shall be paid before all debts The expenses of obtaining probate or letters of administration including the costs in-Expenses to be naid curred for or in respect of any judicial

Section 280 Act X of 1865 Section 102 Act V of 1881

Section 279 Act X of

Section 101

1865

1881

next after such expenses proceedings that may be necessary for administering the estate, shall be paid next after the funeral expenses and death-bed charges

The amount paid or agreed to be paid by an administrator to a person as a consideration or inducement for his being sarety for the due adminis tration of the estate must be included in the expenses of obtaining letters of administration under this section-Imam Bakhsh v Purna Mal 31 PR 1906 133 PLR 1906 The co ts incurred by a party who though a necessary party was not cited in prior probate proceedings in connection with his application to recall the probate and have the will proved in solemn form fall within the purview of this section-Sarat Chandra v Pramatha 37 CWN 113 (117) A beneficiary who successfully resists an attempt by another beneficiary to prove a false will is not as a matter of right entitled to be paid his costs out of the

estate. The costs are in the discretion of the Court and may be directed to be paid out of the estate of the deceased under this section in a suitable case-Barada v Gajendra 13 CWN 557 (563) 1 IC 289 If the cause of litiga tion relating to the estate takes its origin in the fault of the te tator or those interested in the residue the co ts may be paid out of the estate. So also if there is a sufficient and probable ground looking to the knowledge and means of knowledge of the opposite party to question either the execution of the will or the capacity of the testator or to put forward a charge of undue influence or fraud the costs will be paid out of the estate and will not be realised from the losing party-Mitchell v Gard 3 Sw & Tr 275 Thus the costs were paid out of the estate where the party was led into the contest by the state in which the deceased left his papers-Hillam v Walker 1 Hagg 75 or where the validity of the will was contested on a doubtful point of law-Robins v Dolphin 1 Sw & Tr 518, or where there was a reasonable doubt as to the testator's testa mentary capacity at the time of the execution of the Will-Free v Peacock 1 Rob 456 But it does not follow that a party is entitled to his costs out of the estate because there is justa causa litigands-Baruick v Mullings 2 Hage 234 Where the construction of the will was not so difficult as to have required the assistance of the High Court held that the estate should not bear the costs -Narayani v Administrator General 21 Cal 683 The unsucce sful party for feited his claim to costs out of the estate when prior to the commencement of the suit the circumstances which prima facie cast suspicion had or might have been removed by inquiries which he had made or had the opportunities of making-Nichols v Binns 1 Sw & Tr 239 An executor was condemned in costs where before the suit he knew that the will had not been validly executed -Clarkson v Waterhouse 29 L J J & M 136

Where an administrator was held hable under see 369 for loss caused to the estate owing to his neglect to get in part of the deceased 5 property he was given credit under this section for the amount of the expenses incurred by him in obtaining letters of administration and the costs of any judicial proceedings necessary for administering the estate—hhisriphai v Hormajika 17 Bom 637 (644)

A legatee performing the duty of an executor in proving the will or codical is entitled to his costs out of the estate—Williams v Goude 1 Hagg 610; Sutton v Draz 2 Phillim 323

Where after the grant of probate of a prior will a subsequent inconsistent was found of which probate was also granted held that under the circum stances of the case as the musched was created by the act of the testator himself the executors of both the wills had the right to be paid their costs out of the scatter was insufficient to pay these costs in full each party should bear his own costs—In the goods of Taumnon 25 Cal 553 (554 555)

Wages for certain ser vices to be next paid and then other debts and then the other debts of the deceased according to their

The language of Act V of 1881 has been adopted,

respective priorities (if any)

S--52

Section 282 Act X of Section Int Act V of 1881

THE INDIAN SUCCESSION ACT Save as aforesaid, no creditor shall have a right Save as aforesaid all debts to be paid equally

of priority over another, but the executor of administrator shall pay all his own, equally and rateably as far as the assets of the such debts as he knows of, including deceased will extend

The language of section 104 of Act V of 1881 has been adopted. Section 282 The language of section 104 of Act  $\nu$  of 1861 has been adopted. Section  $\cos$  Act X of 1865 contained the words by reason that his debt is secured by an of Act X of 1800 contained the words by reason that his debt is secured by an instrument under seal or any other account after the word another These instrument under seal or any other account after the word abouter these words have been omitted from the present section as they are merely explanatory Report of the Joint Committee

Scope —Sec 323 merely lass down a rule of procedure that must be followed by an executor or administrator. It is clearly not applicable when be tollowed by an executor or administrator it is clearly not applicable when a creditor who has obtained a judgment and decree against the estate of a a creditor who has obtained a juogment and decree against the estate or a decree person applies to execute the decree against the estate in the hands deceased person applies to execute the occree against the estate in the nanus of the legal representative of the deceased—Kissondas v Inettal 38 Bom LR 864 AIR 1936 Bom. 423

Thus section deals with the creditor's rights as regards the general assets Ins section deals with the creditor's rights as regards the general assets their deceased debtor and apart from any question of then the object is of their deceased debtor and apart from any question of their objects in the prevent any one creditor obtaining an advantage over another in respect of to prevent any one creator cotaining an accanatage over another in respect to the payment of his debt and to provide for the payment of all claims proporthe payment of his debt and to provide for the payment of all claims proper tionately out of the assets of the estate. The language of this section shows that tonately out of the assets of the estate. The language of this section shows that Legislature is dealing with cases where the general assets or the realisable the Legislature is dealing with cases where the general assets or the transaction assets are or may be insufficient for the payment in full of the claims of all the assets are or may be unsugneeur for the payment in mill or the claims of an use creditors and not with cases where the realisable assets are amply sufficient for creditors and not with cases where the realisable assets are amply supported the immediate pa) ment of all the claims in full. If the assets are admittedly the immediate payment or an the claims in tun it the assets are auditively sufficient the executor or administrator has no power to postpone indefinitely sunicient the executor or administrator has no power to postpone incennitely administrator General 25 Cal 54 (61) the payment of deols—United Nath v Administrator General 25 Lat 36 [01]

No debt is entitled to priority on the ground that it is a specialty debt os) we deep is entitied to priority on the ground that it is a specialty deep or a debt of record or debt due to the Crown. But a debt secured by a hen or a deat of record of dept due to the Crown but a deat secured by a new on the property stands on a totally different footing and is entitled to priority on the property stands on a totally different footing and is entitled to priority because the executor or administrator takes the property subject to the charge -Dialu Mal v Bryan 11 PR 1878

So also this section does not interfere with the right of a decree holder So also this section does not interfere with the right of a decree holder sec 50 of the C P Code (1908) to have his decree satisfied out of the under sec 50 of the C P Code (1908) to have his decree satisfied out of the property of the deceased in the hands of the legal representatives of the property or the oecoasco in the names or the legal representatives or the deceased to the exclusion of other creditors—Wilhornal v. Reed 12 BLR 287 deceased to the exclusion of other creditors—Nukemad v Reed 12 BLR 287

17 WR 513 Remfrey v De Pennang 10 Cal 929 Ma Min Due v Shan 17 WR DIS REMITEY, De Froming 10 Cu was via Atm Due v Shun mugam 6 LBR 158 5 Burl T 228 18 IC 510 Ahusubhas v Hormopha mufam 6 LB K 138 3 Burl 1 288 18 1 C 310 Amuruohai v Hormoshka 17 Bom 637 (643) Vonkatarantes an v Krithmasami 22 Mad 194 (196) An 17 Bom 637 (043) \*\*Penkanarangayan v Artennasanı 22 Alad 191 (196) An application for execution against the estate of a deceased debtor was resisted by application for execution against the estate of a occessed ocnor was resisted by the executor on the ground that under Act  $\lambda$  of 1865 he was entitled to one the executor on the ground that timber Act A of year before he could be called upon to pay debte had made no provision for carrying out the 1871 Where an adn that as the C P Code that decree did not [ d be issued-282 Act A of 1865 entitled to pay hims obtained | " V Ryper 70 PR supra payment the deceased and the assets that he was not Dialu v Bri

374A Rateable distribution -Rateable distribution under sec 323 is allowed only among creditors of whose existence the executor is aware his hability to distribute the assets pare passu is limited to the debts which he knows of-Assendas v Juatlal 38 Bom LR 864 ATR 1936 Bom. 423 The section lays down the duty of the executor to pay equally and rateably and to pay neither more nor less. This provision comes as a sequel to the provision that no creditor shall have a right to priority over another it seems to be the intention of the Legislature to cut down each creditor's claim he is not to be entitled to his full debt but merely to an equal and rateable payment out of the assets each creditor can merely require the executor to perform his duty viz to pay debts out of the assets equally and rateably the executor's duty excludes from his competence the power to pay one creditor with the possible result of disproportionate reduction in or less of the claims of the others. The words that no creditor shall have priority over another seem to have the same effect in regard to debts as is stated in greater detail in sec 359 in regard to legacies The creditor cannot require the executor to act contrary to sec. 323 He cannot demand payment to himself as an individual creditor without payment to the rest-Mathuradas v Raimal 37 Bom L R 642 A I R 1935 Bom 385 159 I C 533 He is not justified in paying certain creditors of the deceased in full when he had notice of the claims of other creditors of the deceased before he had actually made the payments-Digly Mal v Bryan 11 PR 1878 The rateable payment referred to in this section is payment out of the assets. It is nowhere provided that it shall be made out of the nett income of the estate or any other specific part of the assets-Omrita v Administrator General 25 Cal 54 (61)

One of the creditors of the deceased brought a suit against the former administrator of the deceased persons estate and obtained a decree in execution of that decree the administrator executed a safe deed conveying a portion of the deceased setate in satisfaction of the judgment debt with the sanction of the Court. The successor of such administrator brought the present suit oset sade the decree and the safe deed. Held that the execution of the safe deed in favour of the creditor was not a correct procedure as it virtually gave, the creditor an undue preference over creditors that the proper way of executing the decree ought to have been to apply for rateable distribution under this section but as the decree was as a matter of fact executed and the safe deed obtained in execution such execution and safe not being tainted with fraud or collusion were binding on the succeeding administrator and acquired the force of res judicated—Bas Meherbas. Maganeland 29 Bom. 96 (100) 6 Bom. LR 853

Application of move able property to payment of debts where domicile not in British India

(1) If the domicile of the deceased was not in Section 283 of move payment payment moveable property to the payment of Section 283 not in Section 283 of moveable property to the payment of Section 283 not in Section 283 not in Section 283 not in Section 284 to 1865 of moveable property to the payment of Section 284 to 1855 of Movie 284 to 1855

(2) No creditor who has received payment of a part Section 284 of his debt by virtue of sub-section (1) shall be entitled to 1865 share in the proceeds of the minoveable estate of the deceased unless he brings such payment into account for the benefit of the other creditors

(3) This section shall not apply where the deceased

nas a Hindu, Vuhammadan Buddhist, Sikh or Jama or an exempled person

18EC, 325

A dies hving his domicile in a country where instruments under scal base of \$500 rupects, and finness ember scal leaving most able property of matturness under scal to the property of most able property to the value of the embount of the property of the scale to the embount of the property of the value of the mass able to the value of the property of the value of the property of the property of the value of the property of th A dies hit ing his domicile in a country where maximents under seal heating moteable biocerti to the value

on instruments not under seal until one half of such debts has been discharded of the amount distinction in proportion to the amount which may remain Note This section has no corresponding provision in the Act of 1881 Sub clause (3) therefore excludes from the operation of the act of load to the act of loa Sub-clause 13/ incidence catalance invita the Act of 1881 applies — Voles on Clauses

S 285 Act 2 01 1865 \$ 105 Act fore legacies.

e personal estate is liable in the hands of the examine to the nature of 325 Debts of every description

whole personal estate is liable in the hands of the executor to the payment of Whole personal citate is habte in the hands of the executor to the payment of the debts of the testator the executor must take care to discharge them before the executor of the executor to the payment of the executor the executor to the payment of the executor that the executor the executor that the exe the debts of the testator the executor must take care to discharge them before the satisfies any description of legacy—Williams 11th Edn p 1077 Even 11 the secutor is himself a resultance the cannot take any money out of the satisfies any description of legacy—Williams 11th Edn p 1077 Even if the execution is himself a resulting legate be caused take any money on the Achie countries to the law in the countries to the countries t the executor is numsely a resultany decades the cannot take any money out of matters which are unifor themselves for the debts specific legaces and other matters. the estate without making prolision for the debts, specific legacies and other short the action of the specific legacies and other through the specific legacies and other through the specific legacies and other specific legacies and specific legacies and other specific legacies and specific legacies are specific legacies and specific legacies and specific legacies are specific legacies are specific legacies and specific legacies are specific legacies are specific legacies and specific legacies are specific legacies and specific legacies are specific legacies are specific legacies and specific legacies are specific lega matters which are prior thereto. It is only after these matters have been cleared that the estate of the festator becomes the property of the residuary legate. It is a standard to the standa that the estate of the festator decides the property of the residuary legatee it the executor who is the residuary legatee takes the money for himself before the control of the control o the executor who is the residuary legatee takes the money for himself before the constant of the part—Gobardhandar v Paying decis and regardes it is a distant or trace Copaldar 60 Cal 30 A I R 1933 Cal 288 (290)

Principle to be followed in respect of payment to legatees before payment of be followed in respect of payment of debts —Executions should not make over the legatees before payment of debts — Executors should not make over the legaces around the debts. If the assets ultimately become mouthered the legaces around the debts around the assets ultimately become moutherent for the legaces. before Payment of the debtg. If the assets ultimately become insufficient for a no. 2. That they arred home file of the the technics will be personally limble—Dates a Northdomes that they arred home file or that the Payment of debts the executors will be personally limble. Dates 1 Nicholana and the court of annual than they acted bong fide or that they acted bong fide or that they acted bong fide or that they acted beng fide or the they acted beng fide or that they acted beng fide or that they acted beng fide or the they acted beng fid (1808) 2 DeC & J 683 It 18 no answer that they acted bong fide or that the result of admenting which they had no reason to anticipate the confidence of the deficiency was the result of something which they had no reason to antispate of the creditors right is defined in sec 36! He is at perfect liberty to antispate on the control of the cont The creditor's 11sht is defined in sec 361 He is at perfect liberty to proceed on an indication of the Specific logaces and the fact that it has already been made on Afficiency Company Northern Sources 1 against any of the specific logaces and the lact that it has already been made

of er makes no difference. See Dottes V Nicholson (Supra). But although this

control late Admin they Admin of our residence in the many the many the form later with O's et makes no difference

Rection 1838 down that debts of every description must be paid before kegaces that

Anna art dalar an account from the control of the control o section lays down that cours of every description must be paid before legacies still the state of the paying any legacy before the payment of it does not debar an executor from paying any legacy before the payment of non-none holina the discharge and shakes one of the none of the debts if the state is admittedly solvent Sec 255 m itself is no bar to the avenuary has in remember the discharge of debts out of the extate of the decreased. Payment of regardes before the discharge of decise out of the estate of the deceased.

The executor has to dissider the duestion from the standpoint of the softence of a standpoint of the softence of the so The executor has to consider the question from the standpoint of the soft ency of the estate. In an admittedly solvent estate see 325 is no bar to payment of the the estate. In an admittedity solvent estate sec 325 is no bar to payment of the distribution of an executor first to ascertain whether the estate is cockent or not if it is legacies before payment to creditors. As a matter of general principle it is the continuous for the change of the duly of an executor first to ascertain whether the estate is solvent or not. If it is not, he should pay the creditors before he pays the legaters. Even in cases, the same manipular should be solved the same manipular should be is not he should pay the creators before the pays the legaters. Even in cases of a sometime for the same principle should be sometimes of a sometime for the same principle should be sometimes. where there has been an administration decree the same principle should be legalee does not entitle the executor

to disregard the above principle-Lala Goberdhone v. Harish Chandra 38 CWN 457 AIR 1931 Cal 609

Effect of payment of legacy before debt -This section merely pro vides that the debts must be discharged before any legacy is paid. But it does not say that if the legacy is paid before the debts are discharged and the legatee deals with the property bequeathed to him by way of mortgage or otherwise that transaction must be taken to be invalid. When a person takes a legacy under a will he takes it subject to the debt due from the estate, but a mortgage by the legatee of the property bequeathed to him is not necessarily invalid even if there are debts due from the deceased-particularly in a case where the legatee mortgaged the property about a year after the death of the testator under the impression that the estate left by the deceased was sufficient to discharge all the debts. A purchaser in execution of a money decree against the estate of the testator cannot claim a valid charge upon the property bequeathed (because a simple money decree cannot create any charge upon the property) and there fore cannot claim a charge upon the legacy in question as against the mortgage-Ambika v Mukto Kisori 10 CWN 38 (40)

If the estate of the deceased is subject to any Section 286 adminis contingent liabilities, an executor or Act X of 1865 Executor or adminis trator not bound to pay administrator is not bound to pay any Section 106 legacy without a sufficient indemnity Act V of 1881 legacies without indem

to meet the liabilities whenever they may become due

376 An executor with notice of even a possible liability cannot safely make payment of legacies or pay over the residue to a residuary legatee. If he does he will have no answer to the claim of the creditor whose contingent claim has ripened into a certain claim-Nector v Gennett Cro Eliz 446 Eeles v Lambert Style 37 54 73 As against the legatee however the executor may claim repayment of the sum which he has paid to the legatee but not if at the time when the legacy was paid the contingent liability had ripened into a debt of which the executor had notice-ferris v Wolferston LR 18 Eq 18 Such being the law an executor is not bound when such liabilities exist to part with the assets either to a particular or to a residuary legatee without a sufficient indemnity-Simmons v Bollond 3 Mer 547 Vernon v Egmont 1 Bligh N S \$54 Dean v Allen 20 Beav 1

If the assets, after payment of debts, necessary Section 287 expenses and specific legacies are not Act of

Abatement of general sufficient to pay all the general legacies Section 107 legacies in full, the latter shall abate or be Act V of diminished in equal proportions, and, in the absence of any direction to the contrary in the will, the executor has no

right to pay one legatee in preference to another, or to retain any money on account of a legacy to himself or to any person for whom he is a trustee

The wording of sec. 107 of Act V of 1881 has been adopted as it states the law more accurately -Notes on Clauses

Abatement of general legacies -In case the assets be sufficient to answer the debts and specific legacies but not the general legacies. the latter are subject to abatement. This abatement must take place among all the general legatees in equal proportions and the executor has no right to give himself a preference in regard to his own legas—Williams, pp. 1085–1087.

378 Priority—The general rule is that all bequests stand on equal footing and it lies upon those who assert the contrary to prove it. It is not sufficient that the words of the will should feave the question in doubt; they must positively and clearly establish that it was the intention of the testator that the bequests should not stand on equal footing. Unless the testator says it himself that he believes his assets to be insufficient the notion that his assets would prove insufficient to pay off all the legacies should not be attributed to him—Thianite's v Fortman (1841) I Coll C C 109 In re Harris [1912] 2 Ch 211 Beston v Booth (1819) 4 Madd 161.

But if by the express words or fair construction of the will the intention of the testator is clearly manifest to give one general legatee a princity over the others that intention must be given effect to as where the testator gave legacies to his two lons and his daughter with a proviso that if the assets should fall short for the satisfaction of those legacies his daughter notwithstanding should be paid her full legacy and the abatement be borne proportionately by the legacies of the sons only—Marsh v. Etans 1 P. Wins. 668. So also priority was given to one general legatee on the ground that the legacy was in favour of the wife and children and on the words of the will the testator could not have intended that the legacy in favour of the wife and children should abate along with the legacies in favour of other legatees—Letum v. Leum (1752) 2. Ves. Sen. 415. See also Re Hardy. 17 Ch. D. 758. 803. Re Backhouse [1916] 1. Ch. 65.

But the intention of the testator to give priority to a particular general legates cannot be gathered from a mere use of the words that a particular legacy is to be given immediately—Blouter v. Morrett (1752) 2 Ves. Sen. 420 Re. Scheweder s. Estate [1891] 3 Ch. 44 or from a direction that a particular legacy is to be given first and another legacy in the second place and after the payment of these legacies a third legacy is to be given—Beeston v. Booth (1819) 4 Mad dock 161. Brown v. Allen 1 Verm 31 Ball v. Ball 27 Bom LR 564 AIR 1925 Bom 337 (338) 88 IC. 86

Thus A made a will whereby he directed as follows (a) to set apart out of my said residuary estate a sum of Rs 1500 for my frend B to be placed at her disposal (b) subject to the algorism I give and bequeath Re 1000 to each one of my grand children and great grand children and (c) Rs 1000 to each of the two sons of my finend B. The assets were insufficient to pay all the legacies in full Held that all the legacies should rank equally and abate in proportion. The words subject to the aforesaid on our discate the intention of the testator that the legacy in favour of B should be paid first—Ball v Ball supra

Section 288 Act X of 1865 Section 108 Act V of 1881 328 Whe e there is a specific legacy, and the assets

Non abatement of specific legacy when assets sufficient for the payment of debts and necessary expenses the thing specified must be delivered to the legatee without any abatement

379 As long as any of the assets not specifically bequeathed remain such as are specifically bequeathed are not to be applied in the payment of

debts although to the complete disappointment of the general legacies. But when the assets not specifically beguegified are insufficient to pay all the debts then the specific legates must abate in proportion to the value of their individual legacies—Steeth v Thornigton 2 Ves. Sen. 561 564, Clifton v Burt 1 P Wms 680 Williams, 11th Edn p 1092.

Right under demon strative legacy when assets sufficient to pay debts and necessary ex penses.

Where there is a demonstrative legacy, and the Section 289 assets are sufficient for the payment of 1863 debts and necessary expenses, the Section 109 legatee has a preferential claim for 1881 payment of his legacy out of the fund from which the legacy is

directed to be paid until such fund is exhausted, and if, after the fund is exhausted, part of the legacy still remains unpaid, he is entitled to rank for the remainder against the general assets as for a legacy of the amount of such unpaid remainder

380 See notes under sees, 151 and 153 The rule as to the right of the demonstrative legatee to resort to the general assets on failure of the source intended does not prevail when there is any direction in the will to the contrary (e.g. that the legaces shall not be paid out of the corpus of the estate)—Chimoan Rayamaniar v Tadikonda Ramachandra 29 Mad 155 (154).

330 If the assets are not sufficient to answer the Section 290
Rateable abatement of debts and the specific legacies, an IRSS
specific legacies abatement shall be made from the Section 110
latter rateably in proportion to their respective amounts
Act V of 1881

#### Mustration

A has bequeathed to B a diamond ring valued at 500 rupees and to C a hote valued at 1000 rupees. It is found necessary to sell all the effects of the testator and his assets after payment of debts are only 1000 rupees. Of this sum rupees 333-54 are to be paid to B and rupees 666 10 8 to C

Note -See Notes under sec 328

331 For the purpose of abatement, a legacy for life, Section 291 exacts treated as a sum appropriated by the will to pro- Act X of

Legaces treated as reneral for purpose of duce an annuity, and the value of an Section III annuity when no sum has been appro- Act Vol annuity when no sum has been appro- Act Vol 1881

380A This section is advisedly an amplification of the definition and illustrations of specific bequests contained in sec 142—Bas Bhikaiji v Bas Dinbas 13 Bom LR 319 11 1C 350 (351)

As regards annuity see Notes under secs 175 and \_To

# CHAPTER VIII

# OI ASSLNT TO A LLCACY BY ENLOUTOR OR ADMINISTRATOR

Section 292 Act X of 1865 Secs 112 148 Act V of 1881 332 The assent of the executor or administrator is

Assent necessary to necessary to complete legatees title to his legacy

#### Illustrations

(i) A by his will becausalties to B his Government paper which is in deposit with the Imperial Bank of India The Bank has no authority to deliver the securities nor B a right to take possession of them without the assent of the executor (1) A by his will have bequeathed to C his house in Calcutta in the tenancy

of B C is not entitled to receive the rents without the assent of the executor or administrator

381 Assent of administrator with the will annexed - This clause corresponds to section 292 of the Act of 1865 which is the first section in Part XXXV of that Act which is headed. Of the Executor's Assent to a Legacy This at once raises the question of section 148 of the Act of 1881. That section runs as follows - In Chapters VIII IX X and XII of this Act the provisions as to an executor shall apply also to an administrator with the will annexed These Chapters deal with (1) the executor's assent to a legacy (2) the payment and apportionment of annuities (3) the investment of funds to provide for legacies and (4) the refunding of legacies. They correspond to Parts XXXVI XXXVII and XXXIX of the Act of 1865 but that Act contains no specific provision of the kind contained in section 148. To take the first question tis the executor's assent to a legacy it would seem that the executor and administrator with the will annexed are in exactly the same position. The reason why the assent of the executor is necessary is that the estate of the deceased is vested in the executor and the legatee's title to the legacies is only inchoate. Equally this is true of the administrator with the will annexed. It would seem therefore that under the Indian Succession Act the assent of an administrator with the will annexed to a legacy is probably necessary though no specific provision exists. It is well settled law in England that this is so-Dee v Mabberly 6 C & P 126 Broker v Charter Cro Eliz 92 Similarly the other provisions specifically mentioned in section 148 appear to be applicable to cases under the Indian Succession Act. The Bill has been drafted to give effect to this view by specific amendment -Notes on Clauses

382 Assent —As it is the duty of the executor to apply the assets in the first place to the payment of the debts of the testator and he is responsible to the creditors for the satisfaction of their demands to the extent of the whole estate the law ordains as a protection to the executor that every legate whether general or specific must obtain the executors assent to the legacy before his title as legatee can be complete and perfect. Hence the legatee has no authority to take possession of his legacy without such assent although the testator by his will expressly directs that he shall do so for if this were permitted a testator might appoint all his effects to be thus taken in fraud of his creditors. But before such assent however the legate has on inchoate right to the legacy such as is transmissible to his own personal representatives, in case of his death before it is paid or delivered—Williams 11th Edn. p. 1100; Wentworth, 14th, Edn. 69. 72. Abagendar Valh v. Khetra Nath, 50. Cal. 171.

(175) 36 CLJ 21 AJR 1923 Cal 21, 71 IC 314 If without the executor's assent the legatees take possession of the thing bequeathed the executor may maintain an action of trespass or trover against him. See Mead v Oriety 3 AU. 239

The matter of assent seems only a perfecting act for the security of the security and therefore the law does not require any exact form in which it is to be given—h.hagenda Nath v h.hetra Nath supra

Though on the assent of the executor the full title passes to the legatee the assent creates no new title, it merely perfects the title under the will and hence if the legacy is void the assent is of no use—Khagendra Nath v Khetra Nath supra Crist v Crist (1849) 50 Am. Dec 481

If an executor refuses to give assent without cause the Coart may compel him to give it—Natin b Nidon [1913] I Ir R 470. The executor is not entitled to withhold his consent arbitrarily, and if he does so the legatee is competent to bring a suit to recover the property bequeathed to him—Vithal V Narayan A 1R, 1931 hag 69 (70) 134 IC 239. The suit may be brought against the executor and if the executor has transferred the property against the executor and the transferree jointly—Nbid

In a suit for legacy the plaint must show that the executors were in possession of sufficient assets to pay the legacy or that they had assented to pay the legacy—Othey Coomar v Kaulash 17 Cal 387 (389) If the executor dies before accepting office this section has no application and the legatee can bring a suit to recover his legacy though there has been no assent to his legacy Rajah Parithasarath v Rajah Venkaladni 46 Mad 190 (223) 43 M L J 486 A IR 1922 Mad 487 70 IC 589

383 Section criticised -In Hasanali v Popatlal 37 Bom 211 14 Bom.LR 782 17 IC 17 the legatee brought a suit against the executors for recovery of his legacy. The executors resisted the suit on the ground that as the executors had not given their assent to the legacy the plaintiff could not sue them directly as upon a complete title for that amount without asking for the administration of the whole estate Held that the proper course for the plaintiff would be to bring a suit to have the whole estate administered. Bearran J n enticising this section observed. I should like to state in passing upon the defence of the executors under sec 112 of the Probate and Administration Act that that section appears to me to be unfortunately worded. If it really means what it says the practical consequences of applying it strictly logically would be absurd for however just a legatee's claim may be no Court could decree it upon an incomplete title Therefore as long as the executors choose to withhold their assent it is difficult to find any remedy of which the legatee might effect tually avail himself I cannot bring myself to believe that the law really meant to leave legatees thus completely at the mercy of perverse or capricious executors and it certainly does appear to me that the Legislature might with advantage alter or add to the words of this section But the Madras High Court is of opinion that a legatee has a right of suit for recovery of his legacy against the executor or administrator or the heirs of the deceased or the person in possession of the assets out of which the legacy is to be paid even though there has been no assent to the legacy-Rajah Parthasarathy v Rajah Ven katadrs 46 Mad 190 (224) 43 MLJ 486 70 IC 689 AIR 1922 Mad 457 So also the Calcutta High Court is of opinion that what Beaman J complains of in the Bombay case is not correct and that it would be an unreasonable construction of the section to hold that till the executor has signified his assent the legatee has no interest whatever in the subject matter of the legacy. Even

Effect of executors

assent to specific legacy

though the executor has not given his assent the legatee has a rested and transmissible interest subject only to the reservation that the legacy whether in his hands or in the hands of his transferee may be imperilled to the extent necessary for the due administration of the estate by the executor-Ahagers -Nath v Ahetra Nath 50 Cal 171 (177)

Executor's power to recover property by suit - A legatee to whom letters of administration with a copy of the will annexed have been granted is entitled to institute a suit for recovery of the possession of the estate which has passed out of the possession of the executor as a result of a transaction entered into with the defendant by the executor in his character as the residuary legates before he renounced the executorship withou taking out probate-Indubroug v Durgacharan 18 Pat. 828

Section 293 Act X of 1865 Section 113 Act V of 1881 Section 148 Act V of 1881

(1) The assent of the executor or administra-

tor to a specific bequest shall be sufficient to divest his interest as executor or administrator therein, and to trans-

fer the subjects of the bequest to the legatee, unless the nature or the circumstances of the property require that it shall be transferred in a particular way

(2) This assent may be verbal, and it may be either express or implied from the conduct of the executor or administrator

#### Illustrations

(1) A horse 13 bequeathed The executor requests the legatee to dispose

of it or a third porty proposes to purchase the horse from the executor and he directs him to apply to the legatee Assent to the legacy is implied (ii) The interest of a fund is directed by the will to be applied for the maintenance of the legatee direct him to apply it. This is an assent to the whole of the bequest. (111) A bequest is made of a fund to A and after him to B The executor

pays the interest of the fund to A This is an implied assent to the bequest to B

(10) Executors die after paying all the debts of the testator but before satisfaction of specific legacies Assent to the legacies may be presumed (v) A person to whom a specific article has been bequeathed takes posses

sion of it and retains it without any objection on the part of the executor. His assent may be presumed

Effect of assent -An executor when he has assented to a legacy and set apart funds to meet it becomes a trustee-Trimbak \ Naravan 33 Born 429 11 Born LR 495 3 IC 164 (165) If there is a specific bequest and the executor assents to it the thing bequeathed thereupon ceases to be a part of the testator's assets and the executor becomes a trustee of it for those who are beneficially interested-Dix v Burford 19 Beav 409 and he is there upon precluded from dealing with it or making title as executor-Attenbourgh v Solomon [1913] AC 76 Penheiro v Joindra 28 CLJ 141 47 IC 289 (290)

After an assent by the executor to a specific legacy the interest in the chattels bequeathed vests in the legatee so that he may bring ejectment or trover to recover it even against the executor himself - Dae v Guy 3 East 120 Billiams v Lee 3 Atk 223 Any legatee who has received the assent of the

executor to his legacy can bring a suit in his own right. The executor may in such a case be a proper party but not a necessary party. And so if the executor dies pending the suit or the appeal, the suit or appeal does not abate.

—Walkins V. Walkins A.I.R. 1930 Lah. 138. 121. 1.C. 177

If an executor once assents to a legacy be can never afterwards retract— Wentworth p 415 and notwithstanding a subsequent dissent a specific legatee has a right to take the legacy and has a hen upon the assets for that specific part and may follow them—Mead v Ornery 3 Atk 238 Toller 311

Assent express or implied -The law has prescribed no specific form for the assent and it may be either express or implied. The executor may only in direct terms authorise the legatee to take pos ession of his legacy but his concurrence may be inferred either from direct expressions or particular acts and such constructive permission will be equally available-- Williams p 1103 Toller 308 309 So where the rents or interest of a bequest are directed to be applied for the maintenance of the legatee during his minority if the executor commences so to apply them his consent to the principal will be presumed-Paramour v Yardley Plond 539 Where a bequest for a term of years subject to a quit rent was devised and after the testator's death his administrator with the will annexed paid the quit rent for six years and in an account rendered to the devisee debited him with the payments so made held that this was sufficient to show the assent of the administrator to the bequest-Doe v Mabberly 6 C & P 126 So also where the executor informs a legatee that he intends him to have the legacy according to the devise or that the legacy is ready for him whenever he will call for it such declarations clearly amount to a good assent to the bequest-Barnard v Pumfrell 5 M & Cr 70 Hawkes v Saunders Cowp 293 The assent of the executors may be presumed if he dies after the debts are paid but before the legacies are satisfied-Cray v Willis 2 P Wms 531 532 Where the executor was also a specific legatee and after having fully administered the estate he died he may be presumed to have assented to his legacy and his title to the bequest may be taken as complete-Sarat Chandra v Pramatha 37 CWN 113 (117)

384A Mortgage by heirs of specific legatee-Priority as between mortgagee and purchaser -An executor who was also a specific legatee obtained probate administered the estate fully except as to satisfying his own legacy and then died. His heirs then minors mortgaged the subject matter of the legacy through their certificated guardian. Thereafter probate of the will was re-called on the application of certain persons and the will directed to be proved in solemn form which was done. Letters of administration with a copy of the will annexed were granted to the eldest of the heirs who alone had become major and a decree was passed for all costs to come out of the estate During the pendency of these proceedings the heirs of the late executor still minors again mortgaged the property to the plaintiff who paid off the first mortgage and then paid the balance of the mortgage money in cash. Some time later the objectors to the probate executed their decree for costs against all the heirs and their right title and interest in the property was sold in execution and purchased by the respondent. The question being whether the respondent's purchase would prevail over the plaintiff's mortgage it was held that the title of the legatee (and therefore of his heirs) was complete at the time of the mortgage that by paying off the first mortgage the plaintiff was subrogated to the position of the first mortgagee and as ultimately the letters of administration covering the specific legacy stood, he

acquired a good title under the mortgage—Sarat Chandia v. Pramatha Nath 37 C  $\gamma \gamma \sim 123$ 

Section 294 Act X of 1865 Ss. 114 148 Act V of 1881 Conditional assent to fan executor or administrator to a legacy may be conditional, and if the condition, and it is not performed, there is no assent

#### Illustrations

(1) A bequeaths to B his lands of Sultangur which at the date of the will and at the death of A were subject to a mortgage for 10000 rupees. The executor assents to the bequest on condition that B Jail within a limited tune pay the amount due on the mortgage at the textator's death. The amount is not paid. There is no assent.

(n) The executor assents to a bequest on condition that the legatee shall pay him a sum of money The payment is not made. The assent is nevertheless

385 Conditional assent —The assent of executor may be given upon a condition precedent as, if he should will the legatee that he will pay the legacy provided the assets are sufficient to answer all demands or in case of devise of a term of years provided the devisee will pay the rent in arrear at the restators death and in that case if the condition he not performed there is no assent. But if the condition is such as the executor had no authority to impose the condition is void and the assent would be considered absolute. So if the assent he on a condition subsequent as, provided the legatic will pay the executor a certain sum annually such condition is void and a failure in performing it shall not direct the legate of his legacy—Wentwardin Office of Executor 14th Edn p 429 Williams pp 1105 1106 Elliott v Elliot 9 M & W 28

Section 295 Act X of 1865 5s. 115 148 Act V of 1881 335 (1) When the executor or administrator is a legitee, his assent to his own legacy is necessary to complete his title to it, in the same way as it is required when

the bequest is to another person, and his assent may, in like manner, be expressed or implied

(2) Assent shall be implied if in his manner of admi instering the property he does any act which is referable to his character of legatee and is not reterable to his character of executor or administrator.

#### Illustration

An executor takes the rent of a house or the interest of Government secunities bequeathed to him and applies it to his own use. This is assent

386 Legacy to executor—In case of legacy bequeathed to an executor the union of the two characters of executor and legates in one person makes no different for this assent is as necessary to a legacy vesting in him in the capacity of a legater as to a legacy vesting in any other person and that on the same principle is: that until he has examined the state of the assets he is incompetent to decide whether they will admit of his taking the thing be

queathed as a legacy-Wentworth 67 68 Toller 345 Williams 1108 If one of several executors be a legatee his single assent to his own legacy will vest the complete title in him-Tounson v Tickell 3 B & A 31 40

Sub section (2) is taken from Doe v Strurges 7 Taunt 223

If an executor legatee renounces probate his assent to his own legacy will be ineffectual and he cannot take the thing bequeathed without the permission of the administrator with the will annexed if he does so he will incur the same habilities as any other legatee so acting-Broker v Charter Cro Elez 92

The assent of the executor or administrator to Section 296 a legacy gives effect to it from the Act X of death of the testator Effect of executors assent

Ss. 116 148 Act V of 1881

#### Illustrations

(1) A legatee sells his legacy before it is assented to by the executor. The executor's subsequent assent operates for the benefit of the purchaser and completes his title to the legacy

(n) A bequeaths 1000 rupees to B with interest from his death. The exe cutor does not assent to his legacy until the expiration of a year from As death B is entitled to interest from the death of A

387 The assent of the executor shall have relation to the time of the testator's death hence in the case of a devise for a term of years in a house or land if after the testator's death and before the executor's assent rent from the under tenant becomes payable the assent by relation shall perfect the legatee's title to the rent-Wentworth 445 446 See also Saunder's case 5 Co 12b Rex v Commissioners [1920] 1 kB 468 So such assent shall by relation confirm an intermediate grant by the legatce of his legacy-Toller 311 Ahagendra Nath v Khetra Nath 50 Cal 171 (176) 36 CLJ 21 AIR 1923 Cal 21 71 IC 314

337 An executor or administrator is not bound to Section 297 pay or deliver any legacy until the ex- Act X of Executor when to deli piration of one year from the testator's Ss 117 148 ver legacies, death

Act V of 1881

#### Illustration

A by his will directs his legacies to be paid within six months after his death. The executor is not bound to pay them before the expiration of a year

388 If a legacy be given generally without specifying the time when it is to be paid it is due on the day of the death of the testator though not payable till the end of a year next after the testator's death. This delay is merely an allowance of time for the convenience of the executor in order that the testator's debts may be ascertained and the executor made acquainted with the exact amount of assets, and does not prevent the interest vesting immediately on the testator's death-Garthshore . Chalse 10 Ves, 13 Hence if the legated happens to die within the year his personal representative will be entitled to the legacy See sec. 104 If however the state of the testator's circumstances be such as to enable the executors to discharge the legacies at an earlier period. they have authority to do so-Pearson v Pearson 1 Sch. & Lef 12; Angerstein V Martin 1 Turn & R 241 The effect of this section read with sec. 366 is that a residuary legatee becomes entitled to the residue after the executor has paid the testator's debts and legacies and that no legatee can insist upon being paid within a year from the testator's death-Macked v Sorabis 7 Bom L R 755

A direction by the testator that the will shall not have any effect (beyond proving the will) for at least two years from the arrival of the news of the testator's death does not invalidate the will but is merely a postponement of the payments directed by the testator and has the effect of giving the executor two years instead of the statutory period of the year-Administrator General v. Hughes 40 Cal 192 (206) 21 JC. 183

## CHAPTER IX

OF THE PAYMENT AND APPORTIONMENT OF ANALISTIES

Section 298 Act \ of 1865 Section 118 Act V of 1881

by will

338 Where an annuity is given by a will, and no time is fixed for its commencement, it shall Commencement of an nuity when no time fixed commence from the testator's death. and the first payment shall be made at

the expiration of a year next after that event

389 This section is taken from Gibson v Bott 7 Ves 96 97 Fearns v Young 9 Ves 553 Stamper v Pickering 9 Sim 196 and Re Robbins 119071 2 Ch 8 13 cited in Williams p 1115

Section 299 Act A of 1865 Ss 119 148 Act V of 1881

Where there is a direction that the annuity shall 339 be paid quarterly or monthly, the first When annuity to be paid quarterly or month payment shall be due at the end of the ly first falls due first quarter or first month, as the case

may be, after the testator's death, and shall, if the executor or administrator thinks fit, be paid when due, but the executor or administrator shall not be bound to pay it till the end of the year

The rule in this section is taken from Storer v Prestage 3 Maddock 167 Houghton v Franklin 1 Sm. & Stu 390 cited in William p 1116

Section 300 Act % of 1865 Section 120 Act V of 1881

(1) Where there is a direction that the first 340 payment of an annuity shill be made Dates of successive within one month or any other division payments when first pay ment directed to be made of time from the death of the testator. within a given time or or on a day certain, the successive payon a day certain death of annualant before date ments are to be made on the anniverof payment sary of the earliest day on which the

will authorises the first payment to be made

(2) It the annuitant dies in the interval between the times of payment, an apportioned share of the annuity shall be paid to his representative

391 In England the second years payment is made not on the anni very of the day directed for first years payment as provided in this section but at the end of the second year See Irvin v Ironmonger 2 Russ & M 531

### CHAPTER X

Of the Investment of Funds to provide for Legacies

341 Where a legacy, not being a specific legacy, is Section 301
Investment of sum bequeathed where legacy prot specific given for life, the sum bequeathed \$\frac{Act \text{Act \text{Act \text{Vof}}}}{\text{shall at the end of the year be mivested Section 121} in such securities as the High Court \$\frac{Act \text{Vof}}{\text{1881}}\$
may by any general rule authorize or

direct, and the proceeds thereof shall be paid to the legatee

as the same shall accrue due

342 (1) Where a general legacy is given to be paid Section 302

Investment of general legacy to be paid at invest a sum suffi-Sections 122 future time disposal of intermediate interest in section 341

Met Vot mentioned in section 341

1881

(2) The intermediate interest shall form part of the residue of the testator's estate

392 In respect of legacies which by the will are made payable in future although the legacies are not entitled to receive their legacies before the day of payment arrives yet they are entitled to go into the Court of Chancery and pray that a sufficient sum be set apart to answer the legacy when it shall become dive-Phipps V Annesley 2 Ath. 58 (per Lord Hardwick)

343 Where an annuity is given and no fund is Section 303 for fund an annuity is given and no fund is Section 303 for fund an annuity of the specifical fundamental principles and the specifical fundamental funda

Transfer to residuary legates of contingent the residuary legates of the amount of the legacy, but may Section 124 to the residuary legates, if any on his giving sufficient 1881 section 24 to the legacy if it shall become

aue

346

393 The rule in this section is taken from Webber v. Webber 1 Sm & Stn 311

Section 305 Act X of 1865

345 (1) Where the testator has bequeathed the re sidue of his estate to a person for life Investment of residue without any direction to invest it in bequeathed for life with out direction to invest any particular securities, so much in particular securities.

thereof as is not at the time of the testator's decease invested in securities of the kind mentioned in section 341 shall be converted into money and invested in such securities

(2) This section shall not apply if the deceased was a Hindu Muhammadan, Buddhist, Sikh or Jama or an exempted person

Section 306 Act X of 1865 Section 125 Act V of 1881

Where the testator has bequeathed the residue of his estate to a person for life with a Investment of residue direction that it shall be invested in bequeathed for life with direction to invest in certain specified securities, so much of specified securities the estate as is not at the time of his

Such conversion and investment as are contem-

death invested in securities of the specified kind shall be converted into money and invested in such securities

Section 307 Act X of 1865 Section 126 Act V of 1881 Section 148 Act V of 1881

plated by sections 345 and 346 shall Time and manner of he made at such times and in such conversion and invest ment manner as the executor or administrator thinks fit and, until such conversion and investment are completed, the person who would be for the time being entitled to the income of the fund when so invested shall receive interest at the rate of four per cent, per annum upon the market-value (to be computed as at the date of the testator's death) of such part of the fund as has not

Provided that the rate of interest prior to completion of investment shall be six per cent per annum when the testator was a Hindu Muhammadan Buddhist, Sikh or Jama or an exempted person

Section 308 Act X of 1865 Section 127 Act V of 1881 Section 8 Act VI of 1881

Procedure where mmor entitled to immediate payment or possession of bequest and no direction to pay to person on his behalf

been so invested

(1) Where, by the terms of a bequest, the legatee is entitled to the immediate payment or possession of the money or thing bequeathed, but is a minor, and there is no direction in the will to pay it to any person on his behalf, the executor or administrator shall pay

or deliver the same into the Court of the District Judge, by whom or by whose District Delegate the probate was, or letters of administration with the will anneved were, granted, to the account of the legatee, unless the legatee is a ward of the Court of Wards

(2) If the legatee is a ward of the Court of Wards, the legacy shall be paid to the Court of Wards to his account

(3) Such payment into the Court of the District Judge, or to the Court of Wards, as the case may be, shall be a

sufficient discharge for the money so paid

(4) Money when paid in under this section shall be invested in the purchase of Government securities, which, with the interest thereon, shall be transferred or paid to the person entitled thereto, or otherwise applied for his benefit, as the Judge or the Court of Wards, as the case may be, may direct

394 Where a legatee is an infant the executor is not justified in paying it either to the infant or to the father or to any other relation of the infant on his account without the sanction of a Court of Equity—Dagley v Tollery 1 P Wms. 285 In England it was formerly held that payment to the father of the infant (if the legacy was of a small amount) or to the testamentary guardian was valid—Walsh v Walsh 1 Drew 64 McGreighton McGreighton (1849) 13 Ir Eq 314 But by see 42 of the Trustee Act 1893 (56 & 57 Vict C 53) provision is made for the payment of the legacy in Court. And so it has been held in a recent case that it would be univers for the executor to incur nish in paying a legacy of an infant to his testamentary guardian. The only way to free himself from liability is to pay the money in Court—Re Salomons [1920] 1 Ch. 290

# CHAPTER XI

Of the Product, and Interest of Legacies

349 The legatee of a specific legacy is entitled to the Section 309

Legatees title to pro clear produce thereof, if any, from the Act X of testator's death

Act Y of Act X of Act X of Act Y of Act X of Act Y of Act X of Act Y o

L'ception—A specific bequest, contingent in its terms, issue does not comprise the produce of the legacy between the death of the testator and the vesting of the legacy. The clear produce of it forms part of the residue of the testator's estate.

#### Illustrations

<sup>(</sup>i) A bequeaths his flock of sheep to B Between the death of A and delivery by his executor the sheep are shorn or some of the ewes produce lambs. The wool and lambs are the property of B S-54

- (11) A bequeaths his Government securities to B but postpones the deli very of them till the death of C The interest which falls due between the death of A and the death of C belongs to B and must unless he is a minor be paid to him as if is received
- (m) The testator bequeaths all his four per cent Government promissory notes to A when he shall complete the age of 18 A if he completes that age is entitled to receive the notes but the interest which accrues in respect of them between the testator's death and A's completing 18 forms part of the residue
- Interest on specific legacy Specific legacies are considered as separated from the general e tate and appropriated at the time of the testators death and consequently from that period whatever produce accrues upon them and nothing more or less belongs to the legatee-Sleech v Thorington 2 Ves. Sen 563 Therefore where there is a specific legacy of stock the dividends belong to the legatee from the death of the testator-Barrington v Tristram 6 Ves 345 Bristow v Bristow 5 Beav 289 Cline v Clive Kay 600 And it is immaterial whether the enjoyment of the principal is postponed by the testator or not-Roper on Legacy 3rd Edn Vol II p 227 Where a will be queathed specific property absolutely to the plaintiff then a child and provided that the executor should deliver possession of the property on her marriage the property became the plaintiff's on the testator's death and she was entitled to all the income from that date-Gours v Narma 7 LW 513 23 MLT 353 45 IC 664

Section 310 Act X of 1865 Section 129 Act V of 1881

The legatee under a general residuary bequest Residuary legatee s title is entitled to the produce of the resito produce of residuary duary fund from the testator's death

Exception -A general residuary bequest contingent in its terms does not comprise the income which may accrue upon the fund bequeathed between the death of the testator and the vesting of the legacy Such income goes as undisposed of

#### **Illustrations**

(i) The testator bequeaths the residue of his property to A a minor to be paid to him when he shall complete the age of 18. The income from the

paid to fifth when he shall complete the age to 10 2 me incident on the testator's death belongs to A.

(i) The testator bequeaths the residue of his property to A when he shall complete the age of 18 A if he completes that age is entitled to receive the residue. The income which has accrued in respect of it since the testator's death goes as undisposed of

Section 311 Act \ of 1865 Section 130 Act V of 1831

Where no time has been fixed for the payment of a general legacy, interest begins to run Interest when no time from expiration of one year from the fixed for payment of general legacy testator's death

Liception -(1) Where the legacy is bequeathed in satisfaction of a debt, interest runs from the death of the testator

(2) Where the testator was a parent or a more remote ancestor of the legatee, or has put himself in the place of a parent of the legatee, the legacy shall bear interest from the death of the testator

(3) Where a sum is bequeathed to a minor with a direction to pay for his maintenance out of it, interest is payable from the death of the testator

396 Sections 351 355 relate to interest on annuties or legaces payable by the executor and cannot apply to a sum to be paid to the legace out of the profits of certain immoveable property. The Court can allow interest on such sum at more than 6 per cent as provided by sec. 353—Panchugopal v Kalidas 24 C WN 592 (598) 54 I C 140

As regards general legacies where no time of payment is fixed the executor is by law allowed one year from the testator's death to ascertain and settle his affairs at the end of which time the Court for the sake of general convenience presumes the personal estate to have been reduced into possession. Upon that ground interest is payable from that time unless some other period is fixed by the will—Wood v Penoyre 13 Ves 333 334 Walford v Walford [1912] AC 658. Where no time is fixed the legacy bears interest from the end of a year after the testator's death even though it be expressly made payable out of a particular fund which is not got in until after a longer interval—Lord v Lord (1867) LR 2 Ch 782 (789) Royah Parthasarath v Royah Venkeladin 46 Mad 190 (206) Administrator General v Christiana 43 Cal 201 (205) 34

Exception (1) to this section is taken from Clarke v Sewell 3 Atk. 99, Exception (2) from Wilson v Maddison 2 Y & C Ch C 372 and Beckford v Tobin 1 Ves Sen 310 Exception (3) from Re Richards LR 8 Eq 119

397 Interest on demonstrative legacies -- Under the English law interest is payable on demonstrative legacies from the expiry of one year after the testator's death-Mullins v Smith 1 Dr & Sm 204 The Indian Act makes no provision for payment of interest on demonstrative legacies but follow ing the English law it has been held that such legacies like general legacies bear interest from the expiration of one year after the testator's death Sec 349 provides that the legatee is entitled to the produce of a specific legacy and secs 351 and 352 entitle legatees to interest on general legacies. The absence of a distinct provision in regard to the payment of interest on demonstrative legacies does not imply an intention to disallow interest in such cases-Chinnam Rajamannar v Tadikonda 29 Mad 155 (160) Venkataramayya v Pitchamma AIR 1925 Mad 164 (166) 78 IC 278 Administrator General Christiania 45 Cal 201 (204) 34 I C 157 A demonstrative legacy partakes partly of the nature of a specific legacy and partly of a general legacy and in respect of legacies of both these kinds provision is made either for payment of interest or for the receipt of the produce of the legacy Consequently there is no reason why demonstrative legacies should not bear interest-Venkalaramayja v Pil chamma supra

Where a testator directed that a sum of Rs 10000 to his wife and a sum of Rs 4000 to his daughter should be paid as soon as the proceeds of sale were realised it was held that the legacies were demonstrative that no time haying been fixed for payment the legacy to the wife carried interest after the expiry of one year from the testator's death and the legacy to the daughter being governed by the express terms of exception (2), she was entitled to interest from

THE INDIAN SUCCESSION ACT the date of the death of the testator-Rejanstent v Aiko 34 Bom LR 1124

Section 312 Act X of 1865 Section 131 Act V of 1881

Where a time has been fixed for the payment of Interest when time fixed a general legacy interest begins to run up to such time forms part of the residue of the testator's estate

Liception - Where the testator was a pirent or more remote ancestor of the legatee or has put himself in the place of a parent of the legatee and the legatee is a minor, the legacy shall bear interest from the death of the testator, unless a specific sum is given by the will for maintenance or unless the will contains a direction to the contrary

The rule of law is clear and there can be no controversy with regard to it that a legacy payable at a future day carries interest only from regard to it that a regary payable at a inture day carnes interest only from the time fixed for its Payment—per Lord Carns LJ in Lord v Lord (1867). the time like for its payment—per Lorn Cauris L.J. in Lora v. Lora (1801) L.R. 2 Ch. App. 782 (789) With respect to interest on general legacies where the time of payment is fixed by the testator the general rule is that the legaces where and time to payment to meet by the tenants, the general rate of that the regarded value of the appointed period as for instance in not tarry interest octore the arman of the appointed period as for instance, when the legatee shall attain 21—Heath v Perry 3 Ath 101 Tyriell v Tyriell Ves 1 Nor will it make any difference that the legacy is vested—Heath V 9 Yes 1 Nor will it make any unicitate that the regary is reaccumental Perry supra Crickett v Dolby 3 Ves. 10 Festing v Allen 5 Hare 575 577

Exception - The Exception is taken from Williams p 1159 The general rule is that interest runs from the appointed time but to this general rule an control shall be made where the testator was a parent or more remote ancestor of the legatee or has put himself in the place of a parent of the legatee and the on the regarder of this pain influence in the phase of a patient of the regarder and the legacy shall bear interest from the death tagates is a minor and in that case the repay shall that interest from the acuto of the testator. But no exception need be made to the general rule in case of the letturor Dut no exception need be made to the general rule in where a specific sum is given by the will for the maintenance of the minor Rate of interest

Section 313 Act X of 1865 Section 132 Act V of 1881

The rate of interest shall be four per cent, per annum in all cases except when the Buddhist Silh or Jama or an exempted person in which case it shall be six per cent per annum

See Panchu Gopal v Kalıdas 24 CWN 592 cited under sec 351

Interest There is a statutory right to recover interest under sec 353 Interest there is a samming figure to recover interest under sec 300 the Succession Act and the fact that a claimant waits for several years of the Succession act and the fact that a cannant waits for several years before he comes to Court is no ground for refusing interest if his claim is before ne comes to Louis is no ground for remaining interest it has custom its within time. But the question of interest pendente lite and future interest is within time out the question of the Court and an appellate Court will not entirety within the discretion of the court and an appendix court will not interfer with the discretion exercised by the trial Court on the mere ground that the Court has not given any reasons for the award of such interest or that the court has not given any reasons on one amount or south interest on the refusal to award the same—Hemongion Devs v And Kisma AIR 1938

No interest on arrears of annuity within first year after testators death.

354 No interest is payable on the arrears of an Section 314 Act X of annuity within the first year from the 1865 death of the testator, although a period Section 133 earlier than the expiration of that year 1881 may have been fixed by the will

for making the first payment of the annuity

As the first payment of the annuity is due at the expiration of one year from the testator's death (see 338) it is only after that period that the interest may be claimed

355 Where a sum of money is directed to be invested Section 315 to produce an annuity, interest is pay- Act X of Interest on sum to be able on it from the death of the Section 134 invested to produce an nuity testator 1881

## CHAPTER XII

# OI THE RELUNDING OF LEGACIES

When an executor or administrator has paid a Section 316 legacy under the order of a Court, he 1865 Refund of legacy paid is entitled to call upon the legatee Sections 135 to refund in the event of the assets V of 1881 under Court's orders. proving insufficient to pay all the legacies

399 Where the payment of the legacy by the executor is under the compulsion of a suit he is entitled to compel the legatee to refund in case of deficiency of assets-Newman v Barton 2 Vern 205 Nocl v Robinson 2 Ventr 368

When an executor of administrator has volun-Section 317 No refund if paid tarily paid a legacy, he cannot call Act & of voluntarity upon a legatee to refund in the event Sections 136 and 148 Act V of 1881 of the assets proving insufficient to pay all the legacies

400 Whenever an executor pays a legacy the presumption is that he has sufficient to pay all legacies and the Court will oblige him if solvent to pay the rest and not permit him to bring a bill to compel the legatee whom he had coluntarily paid to refund-Orr v Kaines 2 Ves Sen 194 Cappin v Coppin 2 P Wms 296 Re Horne [1905] 1 Ch 70

When the time prescribed by the will for the Section 318 performance of a condition has elapsed, Act X of Refund when legacy has become due on per without the condition having been per- Sections 137 formance of condition within further time al formed, and the executor or adminis- and 148 Act trator has thereupon, without fraud, lowed under section 137

distributed the assets, in such case, if further time has been

allowed under section 137 for the performance of the condition and the condition has been performed accordingly, the legacy cannot be claimed from the executor or administrator but those to whom he has paid it are liable to refund the amount

Section 319 Act \ of 1865 Sections 138 and 148 Act V of 1881 359 When the executor or administrator has paid

When each legatee away the assets in legacies, and he is afterwards obliged to discharge a debt of which he had no previous notice,

of which he had no previous notice, he is untitled to call upon each legatee to refund in propor-

401 If the executor pays away, the assets in legacies and afterwards debts appear of which he had no previous notice and which he is obliged to discharge he may compel the legaties to refund—Velthorpe v. Bisco. I Ch. C. 136. Doe v. Guy 3 East. 120, 123; Roper on Legacies Vol. 1, p. 398.

Section 320 Act \ of 1865 Section 139 Act V of 1881 360 Where an executor or administrator has given such notices as the High Court may, by any general rule, prescribe, or, if o such rule has been made, as the High Court would give an administration-suit, for creditors and others to send

no such rule has been made, as the High Court would give in an administration-suit, for creditors and others to send in to him their claims against the estate of the deceased, he shall at the expiration of the time therein named for sending in claims, be at liberty to distribute the assets or any part thereof, in discharge of such lawful claims as he knows of, and shall not be liable for the assets so distributed to any person of whose claim he shall not have had notice at the time of such distribution

Provided that nothing herein contained shall prejudice the right of any creditor or claimant to follow the assets, or any part thereof, in the hands of the persons who may have received the same respectively

This clause reproduces sec 320 of the Act of 1865 and sec 139 of the Act of 1881. It would be preferable if the wording of sec 139 had been adopted but this would movie a slight change in the law—Notes on Clauses. The words as the High Court may by any general rule prescribe have been taken from the Act of 1881 and the words as the High Court would give in an administration suit. have been taken from the Act of 1865.

This section is based on sec 29 of Lord St Leonard's Act 1859 (22 & 23 Vict c 35)

Follow the assets —The proviso to see 360 does not create a right it is saves one if the statute has given it. The expression follow the assets is one which is commonly used in cases of trust property. A creditor has got the right to follow the assets in the hands of the legatees. But a creditor who has been vigilant and comes for and in an administrator; and takes devidends

THE INDIAN SUCCESSION ACT suit But where the executor is himself the specific legatee the administration of a charge masser account a local representation of a out. Due manie the executor is minor the specific refactor the authorisation of a decree passed against a logal representative of a decree passed decree is in the nature of a decree passed against a legal representative of a decreed person within the meaning of sec 52 (1) C. P. Code and it can be consistent to the hands of the appearance of the appearanc executed person when the meaning of sec 22 11) of core and a can be executed directly by attachment and sale of the property in the hands of the property of of the proper executed different by statement and sale of the property in the nation of the creditor need not be relegated to a separate suit-ISEC 361 Sunt V Samarendra 42 CWN 65

Section 322 Act X of 1865 Section 141

1881

Act V of cannot oblige one paid in full to refund

If the assets were sufficient to satisfy all the When legatee not legacies at the time of the testator's death, a legatee who has not received payment of his legacy, or who has been

cannot oblige one who has received payment in full to compelled to refund under section 361, tefund, whether the legacy were paid to him with or without suit, although the assets have subsequently become deficient by the wasting of the executor

403 This section is taken from Williams p 1192 A fortion one legatee cannot oblige another to refund where loss of the assets has occurred not by the carant ounge mounter to return where was in the assets has occurred not by an each of the executor but from merely accidental circumstances—Fouriet v

Section 323 Act X of 1865 Sections 142 and 148 Act V of

1881

If the assets were not sufficient to satisfy all the When unsatisfied le gatee must first proceed against executor if sol legacies at the time of the testator's death, a legatee who has not received payment of his legicy must, before he

first proceed against the executor or administrator if he is can call on a satisfied legatee to refund, solvent, but if the executor or administrator is insolvent or not hable to pay, the unsatisfied legatee can oblige each satisfied legatee to refund in proportion

404 If the assets were not originally sufficent to pay all the legacies and one legatee receives his legacy in full the unsatisfied legatee may compel and one legatee receives his legacy in that the unsatisfied legatee may compete the one so paid to refund—Walcott v Hall 1 P Wins 495 (per Sir J Jekyll) the one so pare to retund—" accourty rout 1 ? 1) ms 450 (per 51r J Jekyll).

But if the executor is solvent the unsatisfied legate cannot maintain a suit But it the executor is someth, the unsatisfied regative cannot maintain a suit against the legatee because the remedy in the first instance is against the against the regative occause the remedy in the first instance is against executor—Orr v. Aomes 2 Ves. Sen. 194. Roper on Legacies. Vol. 1. p. 399

Section 324 Act X of 1865

Joe 1 ne retunding of one exceed the sum by which the selegate to another stand legacy ought to have been The refunding of one legatee to another shall Section 143 one legatee to another Act V of reduced if the estate had been properly administered 1881

A has bequeathed 240 rupees to B 480 rupees to C and 270 rupees to B 480 rupees to B 400 rupees and 40 rupees and 40 rupees to B 400 rupees and 40 rupees and 40 rupees to D and 270 rupees to D C and D base seek 200 and D to refund 120 rupees of D C and D base been paid and D to refund 120 rupees

365 The refunding shall in all \$ 325 Act to be with cases be without interest S 141 Act harns 11th Edn p 1193

The surplus or residue of the deceased's property, Section 326 after payment of debts and legacies, Act X of shall be paid to the residuary legatee Section 145 e after usual to be paid to when any has been appointed by the Act V of legatee

When the executor had paid all the debts the funeral and testa and all the legacies heretobefore mentioned he must in the pay over the surplus or residue of the personal estate to the residuary any such be nominated and although the residuary legatee dies before

of debts and before the amount of surplus is ascertained yet it e on his personal representatives-Williams 11th Edn p 1191 Farndell Carth 52 Toller 341 A residuary legatee does not become r until after the administration has been completed and the residue has ertained and made over to him-Ganoda Sundary v Nalini Ranjan

(42) 12 CWN 1065 As soon as on the expiration of the executor s 337) the executors have liquidated the estate that is reduced it into n and paid the debt and legacies the residue becomes free for enjoyment heirs, or in other words divisible. Whether it is actually divided or mmaterial if it is in a condition to be divided-Macleod v Sorabis R 755 As to who is a residuary legatee see Notes under sec 102

Where a person not having his domicile in British Sec 326A er of assests from India has died leaving assets both Act X of in British India and in the country in Sec 145A India to executor mistrator in coun which he had his domicile at the time Act V of domicile for dis of his death, and there has been a Secs 9 and of probate or letters of administration in British India 16 Act II

respect to the assets there and a grant of administrathe country of domicile with respect to the assets It country, the executor or administrator, as the case , in British India after having given such notices as

entioned in section 360, and after having discharged, at spiration of the time therein named, such lawful claims knows of, may, instead of himself distributing any us or residue of the deceased's property to persons ing out of British India who are entitled thereto, fer, with the consent of the executor or administrator, - case may be, in the country of domicile, the surplus sidue to him for distribution to those persons

In re Stock 54 All 505 197 1C 201 A1R 1932 All 384 (385) An executor may pay a debt proved to be justly due by his testator although barred by limitation—Norton v Frecker 1 Ath 525 But he would commit a devostant if he pays a debt which has been judicially declared to be barred by limitation—Mdgley whdgley [1893] 3 Ch 282

A disposing of the goods of the testator to the executors own use is no detastant if he pays the testators debt to the value with his own money in such order as the law aponints—Merchant v Driver 1 Saund 307

Devastavit by one of co executor. —A devastavit by one of two executors or administrators will not charge his companion provided he has not intentionally or otherwise contributed to it for the testator's having misplaced his confidence in one shall not operate to the prejudice of the other—Williams Ith Edn p 1450 Williams v Nixon 2 Beav 472 Satya Kumar v Satya Anjal 10 CLJ 503 3 1C 247 (253 254) Hence an executor will not under ordinary circumstances be re ponsible for the assets come to the hands of his co executor—Ibid.

369 When an executor or administrator occasions a Section 328 loss to the estate by neglecting to get 1885 or administrator for neg led to get in any part of the property of the Section 147 deceased, he is liable to make good the 1881

Illustrations

amount

(1) The executor absolutely releases a debt due to the decea ed from a volvent person or compounds with a debtor who is able to pay in full. The executor is liable to make good the amount of the executor is liable to make good the amount and the debtor is able to plead that the claim is barred by limitation and the debt is thereby lost to the estate.

The executor is liable to make good the amount 407 Acts of negligence ... If an executor delays the payment of a debt payable on demand with interest and suffers judgment for the principal and interest accrued after the testator's death this is a decastavit for the interest unless the executor can show that the assets were insufficient to discharge the debt immediately-Seaman v Everard 2 Lev 40 Where the exe cutor permits debts carrying interest at a specified rate to run on when he has in his hands a fund to pay them he will be charged with interest at that rate-Hall v Hallet 1 Cox 134 138 If the executor by his delay in commencing an action has enabled the debtor of his testator to protect himself under a plea of limitation this amounts to a devastation-Hayward v Kinsey 12 Mod 573 So also where by the neglect of the executor a suit to recover an im Proveable property of the deceased has become barred by limitation-hesho Prasad v Madho Prasad 3 Pat 880 (912) 5 PLT 513 AIR 1924 Pat 721 An executor cannot without great reason permit money to remain upon Personal security longer than is absolutely neces ary. So where for more than three years the executors permitted money to remain due on bond to the testator without inquiring into the circumstances and situation of the obligor or calling upon him to pay the money held that on the obligor's becoming bankrupt the executors were responsible-Powell v Evans 5 Ves 839 An administrator who compromised a claim which was found to be an unfounded one and thus gave up his right to a sum of money under the compromise undoubtedly occasioned a loss to the estate and was held hable to make good the amount-Ahusrubas v Hormujsha 17 Bom. 637 (644)

# CHAPI'ER XIII

Or THE LIABILITY OF AN ENCOUTOR OR ADVINISTRATOR Section 327

Act X of 1865 Section 146 Act V of 1881

When an executor or administrator misapplies Liability of executor or administrator for de the estate of the deceased, or subjects it to loss or damage, he is hable to make good the loss or damage so occasioned

(1) The executor pays out of the estate an unfounded claim. He is hable to make good the loss to make good the loss

(1) The deceased had a valuable lease renewable by notice which the executor neglects to give at the proper time. The executor is liable to make a the loss

(m) The deceased had a lease of less value than the rent payable for it but terminable on notice at a particular time. The executor neglects to give the notice. He is liable to make good the loss.

Devastavit —The species of misconduct referred to in this section is called in law a decastacit

The general rule adopted with respect to the liability of executors and administrators on this head is founded upon two principles first that in order not to deter persons from undertaking these offices the Court is extremely hieral in making every possible allowance and is cautious not to hold executors or an making every possione anomance and is cautious not to note executors or administrators hable upon slight ground second that care must be taken to stammistrators name upon signt ground second that care must be taken to guard against an abuse of their (rust—Powell v. Ebens 5 Ves 843 Raphael v.

Where the executor collustely sells the testators goods at an under value when he might have obtained a higher price for them it is a decastant and when he migni have obtained a higher price for them it is a detailet and he shall answer the real value—Wentworth p 302 Rice v Gordon II Beat ne snau answer the real value—ventaorin p out rice v toraon 11 Deav 255. An executor will be guilty of detastant if he applies the assets in pay on executor will be guilty of actastasts in the appues the assets in payment of a claim which he is not bound to satisfy—Morning v Purcell 7 Deg M & G 55 Ver v Emery 5 Ves 141 see Illustration (1) Illustrations (11) Let as a cooresy amery over 141 sec anomalous (1) anomalous (1) of this section are taken from Thompson v. Thompson v. Thompson v. Thompson v. Price 476

So also it is a grave breach of duty in trustees to mux the incomes raised by them from trust properties or money raised by taking out letters of admins by them from the properties of money raised by taking out review of administration in one common fund with their own moneys—In re-Coare 6 Col. 70 trauton in one common innu with their own maneys—in recenter o cal it.

An administrator who pays such debts as he knows of otherwise than equally and cateably in accordance with the provisions of sec 323 is personally liable and attenuity in accordance with the physisons of sec sec is personally macro any loss to a creditor of the deceased occasioned by such improper dis tor any 1028 to a creation of the deceased occasioned by Such improper dis-tribution of the assets—Assatic Banking Corporation v Viegas 8 BHCR OC CIDENTIAN OF THE ASSETS—ASSETS DATE OF CONTROL OF THE ASSETS OF THE ASSE est it an executor improperly appoints another to receive the money of the festator and that person makes default this is a devastavit. Jenkus v Plombe testator and that person makes detaill this is a devostavit—jensins v rionve
6 Mod 93 Where there is want of proper care and diligence on the part of an to account to hiere sucre is wait or proper care and ungence on the part of each control only in the selection and appointment of an agent to carry on the executor not only in the selection and appointment of an agent to carry on the first business but also in the supervision of the acts of the agent the loss sustained by the estate in consequence must fall on the executor—Lakimuckand Subatings by the estate in consequence must ran un the executive commission of 1 A Autorbar 29 Bom 170 (186 187) An executor is bound to make the y far Autaroar & Dom 170 (100 167) An executor is pound to make the fund productive and in order to do this he must invest it in some form of sount productive sinu in order to ou this ne must intest it in some form to security if he allows a large sum of money (cf. Rs. 14 000) to remain unit of the security is no answer a large sum or money (eg. 182, 19 000) to remain in.

Invested and unproductive he will be hable for the consequent loss of interestIn re Stock 54 All 605 197 IC 201 A I R 1932 All 384 (385) An executor may a debt proved to be justly due by his testator although barred by limitation—Norton v Frecker 1 Atk 526. But he would commit a decastavit if he pays a debt which has been judicially declared to be barred by limitation—Midgley 18933 3 Ch 282.

A disposing of the goods of the testator to the executors own use is no detastant if he pays the testators debt to the value with his own money in such order as the law appoints—Merchant v. Driver 1 Saund 307

Devastavit by one of co executors —A decastavit by one of two executors or administrators will not charge his companion provided he has not intentionally or otherwise contributed to it for the testator's having misplaced his confidence in one shall not operate to the prejudice of the other—Williams IIIth Edin p 1450 Williams × Nixon 2 Beav 472 Satya Kumar v Satya Knipal 10 CLJ 503 3 IC 247 (253 254) Hence an executor will not under ordinary circumstances, be responsible for the assets come to the hands of his co executor—Ibid

369 When an executor or administrator occasions a Section 328 Act \( \) of administrator for neg lect to get in any part of the property of the Section 147 deceased, he is hable to make good the 1881 of moment.

#### Illustrations

(1) The executor absolutely releases a debt due to the deceased from a solvent person or compounds with a debtor who is able to pay in full. The executor is liable to make good the amount.

(ii) The executor neglects to sue for a debt till the debtor is able to plead.

(ii) The executor neglects to sue for a debt till the debtor is able to plead that the claim is barred by limitation and the debt is thereby lost to the estate. The executor is liable to make good the amount.

Acts of negligence -If an executor delays the payment of a debt payable on demand with interest and suffers judgment for the principal and interest accrued after the testators death this is a decastavit for the interest unless the executor can show that the assets were insufficient to discharge the debt immediately-Seaman v Everard 2 Lev 40 Where the exe cutor permits debts carrying interest at a specified rate to run on when he has in his hands a fund to pay them he will be charged with interest at that rate-Hall v Hallet 1 Cox 134 138 If the executor by his delay in commencing an action has enabled the debtor of his testator to protect him elf under a plea of limitation this amounts to a devastation-Hayward v Ainsey 12 Mod 573 So also where by the neglect of the executor a suit to recover an im moveable property of the deceased has become barred by limitation-Kesho Prasad v Madho Prasad 3 Pat 880 (912) 5 PLT 513 AIR 1924 Pat 721 An executor cannot without great reason permit money to remain upon personal security longer than is absolutely necessary. So where for more than three years the executors permitted money to remain due on bond to the testator vithout inquiring into the circumstances and situation of the obligor or calling upon him to pay the money held that on the obligor's becoming bankrupt the executors were responsible-Powell v Evans 5 Ves 839 An administrator who compromised a claim which was found to be an unfounded one and thus gave up his right to a sum of money under the compromise undoubtedly occasioned a loss to the e tate and was held hable to make good the amount. A husruben v Hormujsha 17 Bom 637 (644)

# $CIIAPTER \lambda III$

# OI THE LIABILITY OF AN EXICUTOR OR ADVINISTRATOR

Section 327 Act X of 1865 Section 146 Act V of 1881

Liability of executor or administrator for de

When an executor or administrator misapplies the estate of the deceased, or subjects it to loss or damage, he is liable to make good the loss or damage so occasioned

(1) The executor pays out of the estate an unfounded claim. He is hable to make good the loss. to make good the loss.

(1) The deceased had a valuable lease renewable by notice which the executor neglects to give at the proper time

The executor is hable to make

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The executor neglects to give but terminable on notice at a paractular time notice. He is hable to make good the loss is called in law a devastavit

Devastavit —The species of misconduct referred to in this section

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The general rule adopted with respect to the liability of executors and the general rule adopted with respect to the manual of executors and administrators on this head is founded upon two principles first that in order auministrators on this nead is iounded upon two principles. Print that in order not to deter persons from undertaking these offices the Court is extremely liberal. not to deter persons from undertanging these offices the court is extremely inderain in making every possible allowance and is cautious not to hold executors or in making every possible allowance and is cautious not to noid executors or administrators liable upon slight ground accound that care must be taken to auministrators manie upon signi ground second that care must be taken to gard against an abuse of their frust-Pouelt v Evans 5 Ves. 843 Raphael v Boekm 13 Ves 410 Tebbs v Carpenter 1 Maddock 298

Where the executor collusively sells the testators goods at an under value when he might have obtained a higher price for them it is a devastant and buted ate inight make bounded a nighter price for them it is a aerastarii and he shall answer the real value—Wentworth p 302 Rice v Gordon 11 Beav are small answer the real value—remission p one rice v torson it pears 255. An executor will be guilty of detastast if he applies the assets in pay an executor win or gunty or actassass in the appures the assets in pay ment of a claim which he is not bound to satisfy—Morning v Purcell 7 ment of a claim winch he is not bound to satisfy—asorming V Phices (1) Dec M & G 55 | ex V Emery 5 Ves 141 see Illustration (1) Illustrations (11) Dec 31 et 00 res 2 mery 0 ves 141 see mustranon (1) mustranons (11) and (11) of this section are taken from Thompson v Thompson 9 Price 476

ROBING V. Audins a ma a Cr 2014 So also it is a grave breach of duty in trustees to mix the incomes raised by them from trust properties or money raised by taking out letters of adminisby them from trust properties or money raised by taking out setters of administration in one common fund with their own moneys—In re Cours 6 Cal 70 An administrator who pays such debts as he knows of otherwise than equally and rateably in accordance with the provisions of sec 323 is personally hable for any loss to a creditor of the decrased occasioned by such improper dis for any 1038 to a tremtor on the increased occasioned by such majorities of the assets—Assatic Banking Corporation v Vietas 8 BHCR OC 20 If an executor improperly appoints another to receive the money of the testator and that person makes default this is a devastacit—fenkin; Plombe 6 Mod 93 Where there is vant of proper care and discence on the part of an executor not only in the selection and appointment of an agent to carry on the execution and vally an one selections and appearance, or an agent or vally or the supervision of the acts of the agent the loss states outsides out also in the supervision of the sats of the agent the sats of the estate in consequence must fall on the executor—Lakinuchand sustained of the coldie in consequence must have on the executor to accommon to find the first part of fund productive and in order to do this he must invest it in some form of then productive and in order to do this me must intent it in some form of money (e.g. Rs. 14000) to remain un invested and unproductive he will be hable for the consequent loss of interest.

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Devastavit by one of co executors -A devastavit by one of two executors or administrators will not charge his companion provided he has not intentionally or otherwise contributed to it for the testator's having misplaced his confidence in one shall not operate to the prejudice of the other-Williams 11th Edn p 1450 Williams v Nixon 2 Beav 472 Satya Kumar v Satya Aripal 10 C.L.J 503 3 I C 247 (253 254) Hence an executor will not under ordinary circumstances be responsible for the assets come to the hands of his co executor-Ibid

When an executor or administrator occasions a Section 328

Liability of executor or administrator for neg lect to get in any part of property

loss to the estate by neglecting to get 1865 in any part of the property of the Section 147 deceased, he is liable to make good the 1881 amount

#### Illustrations

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# PART X

Section 1 (4) Act VII of 1889

SUCCLSSION CIRTHICATIS 370

Restriction on grant of certificates under this

(1) A succession certificate (hereinafter in this Part referred to as a certificate) shall not be granted under this Part with

a right is required by section 212 or section 213 to be estab respect to any debt or security to which lished by letters of administration or probate

Section 5 Act VII of 1901

Provided that nothing contained in this section shall be deemed to prevent the grant of a certificate to any person claiming to be entitled to the effects of a deceased Indian Christian, or to any part thereof with respect to any debt or security by reason that a right thereto can be established by letters of administration under this Act

Section 3 (2) Act VII of 1889

- (2) For the purposes of this Part 'security' means— (a) any promissor) note debenture, stock or other security of the Government of India or of a Local Govern-
- (b) any bond, debenture, or annuity charged by Act of Parliament on the revenues of India

(c) any stock or debenture of or share in, a company or other incorporated institution, (d) any debenture or other security for money issued

by, or on behalf of a local authority (e) any other security which the Provincial Government may, by notification in the Gazette of India, declare

Note —The words stalicised in clause (e) have been amended by the Government of India (Adaptation of Lans) Order 1937

408 Sub section (1) of this section which corresponds to sec 1 (4) of the Succession Certificate Act lays down that a succession certificate is not to be granted in those cases where probate or letters of administration are necessary. be granten in those cases where produce or series of sammoutation are necessary. Bit persons who are not governed by the Hindu Wills Act (see 57 of sairy persons who are not governor by one cannot who are two or of the present Act) do not fall under this clause and therefore are not required to The present act) 60 not not unnect this clause and inferiore are not required take out probate or fetters of administration in respect of a will. These persons take out provate or reciters or auminotiation in respect or a will. These persons can apply for a succession certificate even though there is a will and the mere can apply for a succession extruscate even monga there is a win and the mast fact that he might have applied for a probate is not an adequate ground for fact that he might have apputed for a probable is not an acceptance ground to refusing his application—Rotton Singh v. Chaudhur Roy Singh 2. Lah L.J. 578. Tetusing ins application—Kaitan Singk Chaudanin kai Singk Laul. J siconana v Daulat 2 ALJ 126 Dave Liladhar v Bar Partalt 18 Bom 608 (610) Johns v Danus e Ally see trace thannary var rathur to Din oue (out).

Added v Ba Mahah 16 Bom 712 (714) Achitan v Cherolit 22 Mad 9 The effect of the section here reproduced is apparently that succession

certificate cannot be granted in a case where the law requires probate or letters of administration to establish a repre entative title before the Court. In cases where probate or letters of administration are not essential : e cases falling vithin the Act of 1881 a certificate can apparently be granted. The clause is based on this view of the law—Notes on Clauses.

Even in those provinces to which the Hind. Wills Act does not apply if deceased had made a will still the heir of the testator who does not claim under the uil may apply for a succession certificate—Romesh v Kamini Sundary

39 I C 525 (527 528) (Cal)

If there was a dispute between two porties A and B as to the estate but the party A has failed to establish his title to the estate the other party B may apply for a surcession certificate and the mere fact that the party A has presented an application for letters of administration after the making of the application for certificate by B does not offer any impediment under clause (1) of this section to the grant of the certificate—Ram Saran v. Gappu. 71 PWR 1916 33 IC 603

This section read with sec 214 makes it clear that a certificate can be granted only in respect of the property of a deceased person which goes to the helt-of-the deceased person. A gratuity which is payable to the relations of a person who is killed in duty (under the Workmen's Compensation Act) cannot be said to be property belonging to the deceased and the persons who are entitled to the gratuity are surviving relatives or dependants who may or may not be heirs of the deceased (and in fact some of the heirs are expressly excluded e.g. the major sons). And so a succession certificate cannot be granted in respect of the gratuity—Hamidaba v. Karachi Port Trust. 23 SLR 359 117 IC 151. AIR 1929 Smd 177 (178)

Where the deceased person has left a validly executed will all the estate of that person vests in the executor of the will and no succession certificate can be granted in respect of any part of that estate. The grant of a succession certificate in such a case is barred by sec 370 of the Succession Act—Assan Gopal

Chundal 172 IC 372 AIR 1938 Nag 47

Indian Christian —The proviso to sub-section (1) overrules 7 MHCR 121 where it was held that a Native Christian could not apply for a certificate of heirship

Security — A fixed deposit in a Bank is not a security within the meaning of cl (2)—Guiray v Fugdeo 28 All 477 But it is a debt and therefore succession certificate can be granted in respect of it See Kesho Ram v Ram Kuar 32 All 316 (318)

371 The District Judge within whose jurisdiction the Section 5 decased ordinarily resided at the time of 1889 of his death, or, if at that time he had

tion to grant čerificate

Judge, within whose jurisdiction any part of the property
of the deceased may be found, may grant a certificate under
this Part

409 The corresponding section (sec 3) of Act XXVII of 1860 contemplated the issue of a certificate under the Act only for the estate of a British subject either resident within the district where the certificate was sought or else having no fixed place of residence. There was no provision in the Act for

the administration of the effects of a foreigner domiciled abroad of a Sidder and Annal of Barrollo, Marie Transform to Tr the administration of the effects of a foreigner computed solding of the control ISEC. 372

The word District Judge as now defined in clause (bb) of sec 2 (inserted in clause) and include a stop of sec 2 (inserted in clause). by the Indian Succession Amendment denned in clause (bb) of sec 2 linseries a High Court is now reasonable to 1929 includes a High corresponding to evaluation for the conversal and corresponding to the conversal and corresponding to the conversal and corresponding to the conversal corresponding to the corresponding to th Oy the Andrea Succession Amendment Act XVIII of 1929) includes a right of the Antrophysiology of the Antrophysiolo Scale—In re Bholanath Pot 58 Cal 801 35 C W N 122 (124) A I R 1801 Cal 801 35 C W N 122 (124) A I R 1801 Cal 801 A I R 1931 Rang 281 135 I C 80 See 1801 Cal 801 Cal 8 580 In te Anonachellom 9 Rang 205 AIR 1931 Rang 281 125 IC 80 See Novamber 53 Mad 237 59 MLJ 17 AIR 1930 Mad 779 (781

Under this section the ordinary circumstance which gives use to jurisdiction the section the section of the Court a meadiation. The second Is that of residence within the local limits of the Court's Parishection The second man the local limits of the Court's Parishection The second man has found it as more allowed the court's man has found it as more allowed. DOUGH OF TEMPORAL WITHOUT AND TOWN OF THE PROPERTY OF THE PROP

proysion graning function (i.g. of it may be found) is mere after the deceased at the time of his death and so that the following set all the second set is more after the deceased at the time of his death and the following set all the second set is set in the set in the second set in the second set is set in the second set in the second native and applies only in those cases where the deceased at the time of his ceating of testidence at all. The section clearly gives the Court no and similar the surrounding conferred by had no liked place of residence at all the section cleany sites are court no at a constant and and area of the place of th JURISDICTION IN the second branch unless and until the jurisdiction contented by the first branch would not since Therefore where the decased ordinarily to and hard moreover to the property of Photography and hard moreover to the property within the jurisdiction contented by and hard moreover to the property within the jurisdiction of the property within the jurisdiction of the property within the jurisdiction contented by the property within the jurisdiction content and the hist branch would not arise. Therefore where the deceased ordinarily redied within the jurisdiction of District R and had property within the juristion of Public Report Within the jurisdiction. ided within the Pilitaticition of District R and had property within the pilitatic R. and had pilitatic R. diction of District H it is the District Judge of K who would have jurisdiction by the first fact and not the District Judge of H the Cage is constituted to the District Judge of H the Cage is constituted to the District Judge of H the Cage is constituted to the C to grant the certificate and not the District Judge of A:

by the first part of this section and the alternative provision in the latter part

continuous annincipile Even clause (h) of sec 2772 cannot be invided by the first part of this section and the alternative provision in the latter Part

of the section is not applicable. Even clause (b) of sec. 372 cannot be followed

when the section and the alternative provision in the latter Part

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of the section and the section and the alternative provision in the latter Part

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of the section is not applicable. of the section is not applicable

Even clause (b) of sec 372 cannot be invoked

Section in the procedure sec 372 is not a section relating

The many and the procedure for many to the form of the for to give an extended meaning to see 271 because see 372 is not a section relating to the court of to junisdiction but only with the Procedure for moving the Court—Cham Dist.

V. Chan Chor. 2 Burl. J. 42. 75 IC. 225 A IR. 1923 Rang. 238 (239) His the charts have not his northnany plans of residence by a few laws. Y Chan Chop 2 Mult. J 92 10 1 U. 225 A1 K 1923 Mang 228 (239) 11 Under the surprise of the function of the Presence Course to which the ambiguition of the Presence Course to which the ambiguition deceased at the time of his death had his ordinary place of residence in a form of his hand ordinary place of residence in a form of his hand ordinary had been a formed and his hand ordinary had been a formed and formed his hand ordinary had been a formed and formed and formed his honory for his honory fo which has within the jurisdiction of the District Court to which the application of the District Court for which the application and to from the Court had sufficient authority to corridors the property of the property of the court had sufficient authority to the property of the propert Was made and did his Danness there the Court had sufficient authority to a pharmacris (Panelesco) to monthly district the Court had sufficient authority to a pharmacris (Panelesco) to monthly district the Court had sufficient authority to the pharmacris (Panelesco) to monthly district the Court had sufficient authority to the pharmacris of the pharmacr entertain the application and to grant the certificate though the piace was a result of the piace was soran v Gappu 71 P W R 1916 33 IC 603 V Mahomed 20 W R 286

The term property includes debts for which certificate is taken—Gholam

Where a competent Court states a certificate to a certain person it is not not a contract to a certain person it is not a contract to person as authority to collect Open to a competent court grants a certificate to a certain person it is not a court before which such certificate is produced as authority to collect and a constant of the court of the c Open to a court before which such certificate is produced as authority to collect a such of the court which stands the globs entered therein to question the right of the Court which granted the certificate to so say that the certificate holder has no authority to collect the court which granted the court which g CETHICAGE OF TO SAY THAT THE CETHICAGE MODER THAN NO MILLIONING TO CONTROL THAT TO SAY THAT TO SAY THAT THE CONTROL THAT THE SAY THE S opportunity for liquid—Dursa Day & Gully 27 All 87 (88)

(1) Application for such a certificate shall be Application for certs made to the District Judge by a pett-Prescribed by the Code of Civil Procedure 1908, for the tion stended and verified by or on be-Prescribed by the Code of City Procedure 1900, for the advantify and verification of a plaint by or on behalf of a continuous facility that following behalf of a corrienters half of the applicant in the manner plantiff, and verification of a praint of or on occurrence of a point of the following particulars (a) the time of the death of the deceased,

- (b) the ordinary residence of the deceased at the time of his death and, if such residence was not within the local limits of the jurisdiction of the Judge to whom the application is made, then the property of the deceased within those limits,
- (c) the family or other near relatives of the deceased and their respective residences,

(d) the right in which the petitioner claims,

(e) the absence of any impediment under section 370 or under any other provision of this Act or any other enactment, to the grant of the certificate or to the validity thereof if it were granted, and

(f) the debts and securities in respect of which the

certificate is applied for

- (2) If the petition contains any averment which the person verifying it knows or believes to be false, or does not believe to be true, that person shall be deemed to have committed an offence under section 198 of the Indian Penal Code
- (3) Application for such a certificate may be made in respect of any debt or debts due to the deceased creditor or in respect of portions thereof

Amendment —Sub section (3) has been added by the Indian Succession Amendment Act (\(\lambda\text{IV}\) of 1928) It enables a person to apply for succession certificate in respect of a portion of the debt to the deceased. The reason of this amendment and the cases rendered obsolete thereby have been mentioned in Note 234 under see 214 at page 235 ante

410 A succession certificate can be granted only upon a petition under this section praying for a succession certificate. Where a petition was presented for obtaining letters of administration and on the day of hearing upon an opposition being mide by the other side the Judge recorded that he had no objection to a succession certificate being granted to the applicant and then on a subsequent day he granted a certificate it was held that the procedure was very irregular and the certificate must be recalled and cancelled—Maung Tha v Maung Hlaw 3 Bur LT 153 8 1 C 996 (997)

Certificate to minor —A certificate can be granted to a minor on an applica toon made by him through ins guardiam—Arshinamachartu v v lenkaminah 36 Mad 214 (215) Rain huar v Sardan Sungh 20 All 352 (354) Acht Coomar v Tara Prosunna 5 C.L.R. 517 In re Estate of C v Noyagan A.I.R. 1936 Rang 466 It is true that a minor cannot execute a bond if any such is required by the Court under sec 375 but the execution of the bond by the guardian on behalf of the minor applicant would bind the minor and thus satisfy the requirements of sec 375—histophacharlu v kenkaminah supra. Had it been the intention of the Legislature that a succession certificate would not be granted to a minor they would have expressly said so as they have said in secs. 223 and 236 that probate and letters of administration cannot be granted to a minor—

Ram Litar t Sordar Single supra But the Bombay High Court is of opinion that a constitution of the lands of the lands. Adm Aug 1 Sorger Surger a certificate cannot be granted to a minor out can only be granted to miss are the flowering who is to apply and one the minor
the Propher Vision of the minor
the Propher Vision of the minor-Evaluation and therefore it is the Evaluation who is to apply and not the minorcountry has very keep the and of abstract that and not the minorand analysis of the man of abstract that analysis of analysis o Es parte Vahade, 28 Bom 311 (315)

Court has remarked (b) was of abure) that an application for certificate by contempolators has application for certificate by Court has remarked (b) was of obsert that an application for certificate of the standard of a minor is not contemplated by this section—Calab Charles The Court Co the Ruardian of a minor is not contemplated by this section—outed Chara's the Rumber devices (32,7) (for Ranade J.) The Sind Court formerly followed in holding that an annihilation to the minor ISEC 372 Alor 25 km 523 (527) [Per Ranade J] Inc Sind Court formerly followed the Bombas decision (28 Bom 311) in holding that an application by the monor covers to make the control of the control of the monor covers to make the control of the c the Bomba's decision (28 Bom 311) in holding that an application is the minor sha most star minor and that the proper person to apply the Course freether hold that the minor that the minor and the Course freether hold that the minor and the Course freether hold that the countries of the course freether hold that the countries of the course free the course of the c Intrough his guardian was not competent and that the proper person to apply most set homes! anather than the minor and the Court further held that the Guardian and the Guardians and that the Guardians and the Archaeless and the Archaeless and the Guardians and the Guardians. 1 -s the Rustinan and not the minor and the Court further held that the guardian must get himself appointed as such under the Guardians and 11 and 5 and 12 and 5 and 14 and 5 and 15 and 5 and 15 and 5 and 16 and 5 and 16 and 5 a must get himself appointed as such under the Guardians and Hards Act before the Substitution of the minor Otherwise the Court hould apply for a certificate on behalf of the minor Otherwise the Court hould be a substitution of the minor otherwise the Court hould be a substitution of the minor otherwise the Court hould be a substitution of the minor otherwise the Court hould be a substitution of the minor otherwise the court hould be a substitution of the minor otherwise the court hould be a substitution of the minor otherwise the court hould be a substitution of the minor otherwise the court hould be a substitution of the minor otherwise the court hould be a substitution of the minor otherwise the court hould be a substitution of the minor otherwise the court hould be a substitution of the minor otherwise the court hould be a substitution of the minor otherwise the court hould be a substitution of the minor otherwise the court hould be a substitution of the minor otherwise the court hould be a substitute that the substitute that the court hould be a substitute that the court has a substitute that the court hould be a substitute that the court has a substitu he could apply for a certificate on behalf of the minor otherwise the court nound is the court nound from the cour not recognize his right as fundam—in to Dhonout 4 SLK 286 10 IC 981

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But if the heir obtains a certificate and then assigns the debt it is not necessary

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Amount of the heir obtains a certificate and then assigns the debt it is not necessary. But if the heir obtains a certificate and then assigns the Geot, it is not necessary of the assigns are obtain a second certificate—Rang Let ( Annu Let 36 All 21 Page 237 ante
Clause (b) — This clause has no connection with Section 371 and connection with the section 371 and connection with the section 371 and connection to the section to the sectio

be interpreted so as to five an extended jurisdiction with section 3/1 and cannot be justiced from the justices and the District Judge That De Interpreted 30 as to give an extended jurisdiction to the District Judge in a standard market when the applicant is at liberty to apply either to the District Judge in the district of the Is it does not mean that the applicant is at inderty to apply either to the Distinct of the Annual within whose introduction the deceased ordinarily Faulded or to the Distinct of the Annual of the Annual of the Distinct of Judge Within whose jurisdiction the deceased ordinarily resided or to the District Charging Page 1. Charging Charging Page 1. The deceased had some part of his property— Judge Within whose jurisdiction the deceased had some part of his people of the Chan Plut Chan Char 2 Bur L J 42 (see this case cited under see 371) Clause (d) —By this clause the Legislature intends that a person to whom

Clause (d)—By this clause the Legislature intends that a person to whom the control of the person who has some title or intends to the person who has been also the person who has some title or intends to the person who has some title or intends to the person who has some title or intends to the person who has some title or intends to the person who has some title or intends to the person who has some title or intends to the person who has some title or intends to the person who has some title or intends to the person who has some title or intends to the person who has some title or intends to the person who has some title or intends to the person when the person who have the person who have the person who have the pe a certificate Rolld be Branted must be a person who has some title or interest and a continuous sharper of the person who has some title or interest and a continuous sharper of the person who has some title or interest and a continuous sharper of the person who has some title or interest and a continuous sharper of the person who has some title or interest and a continuous sharper of the person who has some title or interest and a continuous sharper of the person who has some title or interest. In the debt to collect which a certificate is applied for entired to collect the debts of the deceased is a mixer a stranger or a person of sea a stranger or a fedural to the season of sentified to collect the debts of the deceased is a minor a stranger or a reduced in the minor who has only an interest in the minor but no interest in the deceased is a minor as stranger or a reduced in the minor but no interest in the delivery of the stranger of the s of the minor who has only an interest in the minor but no interest in the debt should be minor but no interest in the minor but no interest in the debt should be minor but no interest in the debt should be minor but no interest in the debt should be minor but no interest in the debt should be minor but no interest in the debt should be minor but no interest in the debt should be minor but no interest in the debt should be minor but no interest in the debt should be minor but no interest in the debt should be minor but no interest in the debt should be minor but no interest in the debt should be minor but no interest in the debt should be minor but no interest in the minor but no interest in the debt should be minor but no interest in the minor but no interest in the debt should be minor but no interest Is not entitled to apply for a certificate. The proper procedure is for the minor of the start of the proper procedure is for the minor of the start Attended to apply through his guardian or next triend—Rom Kion v Sardar Singer himself who are after the Court holds that it is the Earthum and after the Advances the according to the Earthum and after the Advances the according to the Earthum Preserve to the Advances the Advan 20 All 352 (351) But the Bombay High Court holds that it is the Eurotoon of Courtinos and after obtaining the certificate he has the Power the Alchor the alm the alm the sounds. Indeed who is to apply and after obtaining the certificate he has the power of the sense of the lunder see 27 Cuardians and Wards Act to receive from the debtor the said and five a receipt for the same. This constitutes the same of change of the same of the constitutes the same. John him to the ward and five a receipt for the same. This constitutes the second of the same of the second of the same of the second of the s I right under which he claims within the meaning of clause (d)—Ex forthal his tax of obsers) that an archeston his the meaning of clause (d)—Ex forthal an archeston his the meaning of the meaning of clause (d)—Ex forthal an archeston his the meaning of the mean | Mahadea Gangadhar 28 Bom 344 | (345) But another Bombay case has ex that an application by the guardian on

behalf of a minor is not within the contemplation of this clause which only permits the petitioner who claims the right for himself to apply—Gulabchand v Moti: 25 Bom 523 (527)

Clause (f) —The petition for a certificate must specify each debt and security in respect of which a certificate is asked and the certificate when granted must likewise specify each debt and security covered by it—Maurig Tha v Maurig Hlaw 3 Bur L T 153 8 1 C 996 (997) A sum of money which is due on the life assurance policy of the husband and payable to hum if he were living on the date of maturity of the policy or to his heirs on his death if earlier is a debt and the wife is entitled to the succession certificate on her husband's death with respect to that sum—Tusts Debya & Bibhut Bhusan A I R 1937 Cal 423

But the applicant is not bound to mention all the debts in his application because under sec. 376 he is at liberty to have the certificate extended to debts not originally mentioned—Sundaranmal v Kullappa 5 MLJ 36

411 No limitation —No rule of limitation applies to an application for succession certificate Art 181 of the Limitation Act does not govern such application—John v. Assaudiu 8 Mad 207

Second application —The mere fact that a previous grant of succession certificate was subject to a condition which the applicant was unable to comply with is no-ground for refusing a second application. Thus where an application for certificate was previously made but it was rejected on account of furmishing in sufficient security held that this fact was no ground for refusing a second application—Poring Koet v Chum Lal 14 AL 1, 1684 35 IC 718

411A Duty-if payable on entire amount of debt where extension carries total beyond Rs 1000 -In the case of Nalini Kanta Pal 37 CWN 930 the first application for a certificate under sec 372 of the Indian Succession Act was in respect of debts amounting to Rs 853 9 6 Subse quently there was a further application in respect of debts amounting to Rs. 146-5 Up to this point the total being under Rs 1000 no duty was payable. Subse quently an extended certificate in respect of debts amounting to Rs 300 was applied for Thereupon the Court asked the petitioners to pay court fee duty at the rate of 2 per cent on the amount of the original certificate and at the rate of 3 per cent on the amount of the extended certificates. The petitioners raised an objection and contended that they were not liable to pay duty in respect of the amounts of the original certificate and the first extended certificate The point urged on their behalf was that as the amount of the debts covered by those two certificates did not either individually or taken together exceed Rs 1000 they were and are exempt from payment of duty in respect of the sums covered by those two certificates. This contention of the petitioners did not commend itself to the learned Munsif who was of opinion that by asking for a certificate in respect of those debts in more than one instalment the petitioners could not reduce the amount of the duty which would otherwise be payable on the entire amount of the debts. The matter was referred to the High Court and their Lordships (Mallik and Jack JJ) held that under Art 121 Schedule I of the Court Fees Act as amended by sec 8 of the Bengal Court Fees Amendment Act of 1922 even when the first certificate and some extensions are for amounts which make a total of less than Rs 1000 as soon as a further extension takes the total beyond Rs. 1 000 duty becomes payable on the amount of the original certificate at 2 per cent and on the amounts of the rest at 3 per cent

In this case their Lordships give no reason at all as to why they hold that when a subsequent extension carries the total beyond Rs. 1000 duty becomes

THE INDIAN SUCCESSION ACT payable on the original certificate at 2 per cent and on all the extensions at payance on the original testimate at a per cont and on an ine extensions at a per cont. The editoral notes of the Calcutta Weekly Notes (Vol YVVIII Notes p 155) may be quoted here for a discussion with regard to the mental for prefation put upon Art 12 Schedule I of the Court Fees Act as amended for By what words then is duty imposed on the certificate or certificate Activate to the amounts covered by them does not exceed Rs 1000? so ong us the outer or the words which say that as soon as an extension cames the total beyond Rs 1000 datty becomes payable on the whole amount that is 333 on the original certificate and on the intermediate extensions also although say on the original extraordic and to the interface extensions and mixed their amounts individually or taken together might not come up to Rs 1000. It is elementary that fiscal statutes are to be construed strictly and construed in layour of the subject whenever there is any ambiguity. In the present case in ration of the subject whenever there is any amonguny. In the present was their Lordships themselves say that under Art 12 as now worded if the original certificate be for a sum less than Rs 1000 then no duty is payable original certificate of oil a suni 1838 utati AS 1 VVV uten no utily 18 payame at all either on that certificate of oil any extensions whatever the amounts of the extensions may be But they proceed to observe that it is clear that this was never contemplated by the legislature and that where the certificate is extended beyond Rs 1000 duty should become payable. How is that result extended devoing its a two using showing occurre payable atom to the words used by the legislature creating the position described by their Lordships themselves how can any other intention be attributed

Section 7 Act VII of 1889

(1) If the District Judge is satisfied that there Procedure on applica is ground for entertaining the appliing thereof and cause notice of the application and of the cation, he shall fix a day for the hearday fixed for the hearing-

(a) to be served on any person to whom, in the opinion of the Judge, special notice of the application should be given, and

(b) to be posted on some conspicuous part of the court-house and published in such other manner, if any, as the Judge subject to any rules made by the High Court in this behalf, thinks fit,

and upon the day fixed, or as soon thereafter as may be practicable, shall proceed to decide in a summary manner the right to the certificate

(2) When the Judge decides the rights thereto to belong to the applicant, the Indge shall make an order for

(3) If the Judge cannot decide the right to the certification ficate without determining questions of law or fact which Seem to him to be too intricate and difficult for determination in a summary proceeding he may nevertheless grant a certificate to the applicant if he appears to be the person having prima facte the best title thereto

- (4) When there are more applicants than one for a certificate, and it appears to the Judge that more than one of such applicants are interested in the estate of the deceased, the Judge may, in deciding to whom the certificate is to be granted, have regard to the extent of interest and the fitness in other respects of the applicants
- 412 Procedure—Inquiry —On an application for a certificate the Court ought to make some inquiry into the right of the applicant to the certificate—Though the inquiry is expressed to be summary still there must be an linquiry into the title set up by the applicant prior to the disposal of his application specially when there is a conflict between two parties. Thus is borne out by the provisions of sub-secs (3) and (4). If there has been no inquiry the order of the Judge will be set aside—Hirri Arishnav Balabhadra 23 Cal 431 (485). Basanta v Parbati 31 Cal 133 (136 137). Sitamma v Subbamma 17 Mad 477 (478). Even though the question at issue between the applicant and the opposite party relates to the status (joint or divided) of the family to which the deceased belonged it is the duty of the Judge to proceed to decide the matter in a summary manner—Dharmaya v Sajana 21 Bom 53 Balmakund v Kundun 27 All 482.

All que tions arising in a proceeding under this Part must be determined by a summary\_proceeding is e by a sion inquiry leading up to and resulting in a rapid decision in contrast with the lengthy investigation which may be required for the determination of a regular suit—Galabehand v Blots 25 Bom 253 (525) Bai hash v Parbhu 28 Bom 119 (122) Ram Saran v Gappu 71 PWR 1916 33 IC 503 Rattan Singh v Chaudhuri Raj Singh 2 Lah L. J. 578 Jigis Begum v Syed Als 5 CWN 494 (497) Chunn Lal v Gulab Chand 8 IC 730 Since the decision arrived at by the District Judge in an inquiry under this section is not conclusive and cannot operate as res judicata in a regular suit (see see 387) it is useless to hold an elaborate inquiry—Galabehand v Moti 25 Bom 523 (525) Where the proceedings continued for two years during which there had been fourteen adjournments and not less than 13 witnesses were summoned on each side the High Court condemned the procedure as a scandalous waste of time and expense—Galabehand v Moti 25 Bom 523 (525).

This Act is not intended to afford to litigant parties an opportunity of litigating contested questions of title to property. But though the inquiry is directed to be summary it is to be an inquiry into the right to the certificate. The right to the certificate may not be the same thing as the right to the estate of the decreased proprietor but it is not altogether unconnected with that right for it would be unreasonable to hold that the right to the certificate may belong to a stranger who had no connection with the estate—Hurri Krishha v Bala bhadra 23 Cal. 431 (433, 434)

The question whether certain debts alleged to be due to the estate of the deceased are really due or not is not a matter which can be decided on an application for the grant of a certificate—Srimitesse Charier v Rameiticamy 26; MLJ 365 23 IC 421 (dissenting from 25 Cal 320) Nor is the decision of such a question a prehimmary condition of the grant of a certificate All that a Court has to do is to ascertain the right of the applicant to the certificate apart from the question of the cut ence or non existence of the debts in respect of which he applies—Bai Kashi v Parbhus 28 Bom. 119 (112) 5 Bom LR 721 A Full Bench of the Calcutta High Court has thewaye land down that this

section merely requires the Court to be satisfied that there is a fround for entertaining the application viz that it is a serious and sensible application by a person who desires to make a claim in the representative character which he seeks and that the Court need not enter into the question whether the debts were actually due to the deceased Questions of such a character cannot be litigated upon on an application for succession certificate in the absence of the party (debtor) against whom the claim is made—Bropendra Sudar v Nildati nath 33 C W N 1177 (1186 1189) (FB) 50 C L J 239 A IR 1929 Cal 661 120 IC 241 (overruling Radha Ram v Brindabim 25 Cal 320 2 C W N 59)

When in answer to an application for certificate a will was set up as having bear made by the person with respect to whose estate the application was made and the Court took evidence and having found in favour of the will dismissed the application for certificate it was held that though ordinarily questions regarding a will should not be decided on a summary application for a certificate and the Court would not have commutted any error if it had refused to enter into the validity or invalidity of the will and had granted a certificate to the applicant or if it had called upon the objector to obtain probate of the will still in this case under the circumstances the Court did not act wrongly in trying the question as to the existence of the will and refusing to grant the certificate to the applicant. For if the Court had refused to enter into the question of the will the only effect would have been to put the parties to unnecessary expense and prolonged hitgation—fanhi v Kallu Mal 31 All 23b (237 238) 6 ALJ 171 2 IC 218

The District Judge should himself consider fully and dispose of after such inquiry as may be necessary all applications and objections and he cannot delegate this duty to a Subordinate Judge reserving to himself the passing of the

final order-Raj Koer v Rupan 142 PR 1889

The District Court sitting as a Succession Certificate Court cannot entertain an application for the appointment of a receiver; if the Court does so it acts without jurisdiction—Aanhaya v Kanhasya Lal 46 All 372 (376) 22 ALJ 345 79 IC 363 AIR 1924 All 376

Grant of certificate to a prison other than the applicant —Sub section (2) lays down that if the Judge decides that the applicant is entitled to the certificate he shall grant the certificate to him. If the applicant is not entitled to the certificate the Judge should dismiss the application. But he cannot grant the certificate to the opposite party when there has been no application made by that party for a certificate Such a procedure is at variance with this Act and the Order must be set asade—Suchman v Subbanman 17 Mad 477 (478)

Grant of certificate to minor —The Court is entitled to grant a suc cession certificate to a minor on the application by that minor through his mother as next finend—In re Estate of C V Nayagan A IR 1936 Rang 466 For further and elaborate discussions see Notes under see 372

413 Sub section (3) —This section makes it incumbent on the Court to pass a definite order giving the certificate to one applicant or another with all convenient speed. If the question of title is in doubt the Court should decide it on prima facie grounds to the best of his ability give a certificate accordingly and take security as provided in sec 375. But the Court should not refuse to adjudicate merely because difficult questions arise or because the matter is in issue in a regular suit—Ruthman v. Sam Das 137 PR 1907. The intention of sub-section (3) is not to save the Court the trouble of making any inquiry at all, but to allow the prima faces title to the certificate to prevail when

a question of fact or law arises in the inquiry too difficult to be determined in a summary proceeding. In cases in which no complicated issues are involved and the issues are capable of being decided without any difficulty in a summary proceeding the Court is bound to determine the right to the certificate by a sum mary inquiry-Sit amma & Subbamma 17 Mad 477 (478) If the Judge finds that the proceedings are going to take a lengthy course he should in the exercise of his judicial discretion decline to allow the parties to protract the litigation and should summarily decide the right to the certificate-Gulabchand v Mots 25 Born 523 (525) Chunn Lal v Gulab Chand 8 I C 730 (732) (Oudh) It is not the practice of the Courts to enter on the determination of intrica e questions of law or fact. The practice is to issue a certificate to the person who has prima facie the clearest title to the succession such as the natural heir and to leave a person whose claim to a superior title is on reasonable grounds disputed to establish that title by a regular suit-Surjop v Kamakshiamba 7 Mad 453 Hurri Krishna v Balabhadra 23 Cal 431 (434 435) The object of this Act is to obtain the appointment of some person to give a legal discharge to debtors to the estate for the debts due. It was not intended that nice questions of law as to the rights of the parties to the estate of the deceased should be decided on an application under it but the person prima facie having the best right to the certificate should obtain it. But the decision as to the prima facie right to the certificate should not be taken as deciding anything as to the ultimate rights of the parties in the estate. These if disputed will have to be decided in a regular suit-Gunindra v Juginala 30 Cal 581 (582)

This clause shows that the Court cannot ignore the question of title even! though the proceeding is a summary one Where there are rival claimants each claiming the effects of the deceased the title to the certificate cannot be deter mined unless the question of title to the estate it elf is to some extent gone into And when this title depends upon a question of fact that question must be gone into before it can be held who has the preferential claim to the certificate—Assar Reza v Abdul Hossem 15 Cal 574 (585) The Court has no doubt to satisfy itself that the person to whom it grants the certificate has a prima facie right and for this purpose some inquiry may be necessary in many cases but where the rival claimant is the widow of the deceased person the prima facie right is clear and the Judge need not hold the inquiry at great length-Angappa v Meenaksh: 24 M L J 198 18 I C 733 If certain facts are admitted by both parties and if on these admitted facts the prima facie title to the certificate is found to belong to one of the claimants, the Court may grant the certificate to that claimant. But such cases must be treated as exceptional and ordinarily some inquiry ought to be held even in cases in which many facts are admitted by both parties-Sarasuaths , Subbier 1914 M W N 24 21 I C 867 (868)

The Court need not necessarily hold an inquiry as to the claim of the applicant before it can come to the conclusion that the case raises questions too difficult and intricate for decision in a summary trial. The pleading in the case may be quite sufficient to show that the inquiry would be too intricate or difficult—Amappia v Menaksin 24 MLJ 198 18 12 C 733. This section does not mean that in order to enable the Court to form an opinion as to whether the case involves difficult and intricate questions of law and fact the Court must record the evidence tendered by the parties and frame issues on the questions. Such a procedure would tunnessearily prolong the investigation—Chumu Lal v Gulab Claim 8 1C 730 (731) (Outh). On the other hand, the Court should not assume that whenever any party urges any special ground of claim to the certificate, it necessarily involves the determination of questions of Jaw or

1929 Bom 456 (460)

fact too difficult for determination in a summary proceeding—Silamma v Subbamma 17 Mad 477 (478)

The discretion exercised by a Court under this clause is a judicial discretion liable to the control of the Appellate Court. That is the Appellate Court ray hold that a question considered by the Court of first instance to be an intreast one is not really an intricate one and that it should be decided in the criticate proceedings similarly the Court of Appeal may hold that a question not regarded as intricate by the first Court is in reality an intricate one and not fit for decision in the certificate proceedings. If the Appellate Court comes to such conclusion even wrongly it cannot be said that Court has acted illegally or with irregularity; and its decision is not hable to revision by the High Court—Ramakinshia v. Nagamma? 21 ML J. 824 11 I C 835 (836 837).

414 Clause (4) —This subsection by providing for the grant of a certificate to one or more of several rival applicants regard being had to the extent of their interest and their fitness in other respects indicates that the grant is to be limited to some one or more of the contending parties who make out their title to the estate. There must therefore be some inquiry into the title set up by the applicant before his application is disposed of—Hurn Arishna v Balabhadra 23 Cal 431 (435). This clause empowers the Court to determine which of the several applicants for certificate has prima facts the best title and to make a selection upon a consideration of the cettent of their interest in the estate. This however does not imply that the Judge is competent to is usered certificates to the several applicants for partial collection by each of them of the debts in question—Shield Dis v Der Prasad 16 AU 21 (22 23). It should be noted that sec 372 clause (3) which enables the Court to grant a certificate in respect of a portion of a debt does not apply to such a case because that clause does not contemplate rued applications for the same debt

If there are rival applicants the Judge is only authorised to grant a certificate to the person who has prima face the best title but this clause does not empower limit to go into the question of the rights of the parties and definitely to decide what their respective shares are and to grant certificates to them according to their respective shares—Abdul Galger y Jayrab 31 Bom LR 1093 A 1R

415 Joint certificates — The Act does not authorise a Judge to grant a joint certificate to rival claimants. Where there are several rival claimants it is his dative to decide which of them has the best right and to grant the certificate to such person accordingly—Madam Mohan v Ramdial 5 All 195 (196) Jammobas v Hastuba it Bom. 179 (184) Lonachand v Litemchand is Bom. 684 (685) The Madras High Court also holds that no certificate ought to be granted to rival claimants jountly but the High Court did not interfere with uch a grant having regard to the special circumstances of the case—Narapana sams v Kuppusams 19 Mad 497 (498) See also Mg Pon v Mg Sar UB R (1897 1901) II 563 In an Allahabad case a joint certificate granted to all the heirs was not held to be illegal inasmuch as they were not rival claimants and they consented to its being granted jointly to them all—Ram Ray v Bin Nath 3 All 470 (471) 20 IC 889

374 When the District Judge grants a certificate, he shall therein specify the debts and securities set forth in the application whom the certificate is granted—

- (a) to receive interest or dividends on, or
- (b) to negotiate or transfer, or
- (c) both to receive interest or dividends on, and to negotiate or transfer,

the securities or any of them

416 This section requires that a certificate granted under this Act must specify each debt and security covered by it. The certificate should be in the Form prescribed in Schedule VIII. The debtors column should be filled up with the names of the debtors and the amount of debt should be exactly men tonned. Merely filling the debtors column with the words. From other persons and putting down the amount of debt in a round figure (as. Rs. 600.) do not comply with the requirements of this Act—Maung Tha v. Maung Blaw. 3 Bur LT. 153.8 ELT. 996 (897.)

A certificate when granted should be both for the principal debt and the interest. Where the Court ordered that the widow to whom the certificate was granted was entitled to draw only the interest without disturbing the principal held that the order was ultra vires all that the Court could do was to take if accessary a security for rendering an account of the debts and securities received by her—Jan Dei v Banisari 35 All 249 (250) 19 IC 447 Shib Dei v Ajudhya 9 IC 571 (572) Where the Judge demanded security from the widow and on her failure to do so a certificate was granted directing her only to enjoy the interest on the money during her hife she could bring a suit for a declaration that she was entitled to the whole sum of money—Kesho Rem v Ram Auar 32 All 316 (318) 5 IC 590.

Amendment of Certificate —The Court can in the execuse of its inherent jurisdiction correct any misdescription in a certificate but an amendment changing the nature of the debt cannot be allowed. Thus where the applicant prayed for a certificate in respect of a sum deposted by his father in a Bank but when after obtaining the certificate he applied to the Bank for the mone; it was discovered that the Bank really held G. P. Notes and War Bonds in the name of the deceased and not any money in deposit and thereupon the applicant applied to the District Judge to amend the certificate it was held that such application could not be granted—Sunder Sungh v. Karam Sungh. 110 I.C. 479. A.I.R. 1928. Lah. 892 (833)

375 (1) The District Judge shall in any case in Section 9
Requisition of secunty which he proposes to proceed under Act VII store in State of cert sub-section (3) or sub-section (4) of of 1889 section 373, and may in any other case, require, as a condition precedent to the granting of a certificate, that the person to whom he proposes to make the grant shall give to the Judge a bond with one or more surety or sureties, or other sufficient security for rendering an account of debts and securities received by him and for indemnity of persons who may be entitled to the whole or any part of those debts and securities

(2) The Judge may, on application made by petition and on cause shown to his satisfaction, and upon such terms as to security, or providing that the money received be paid into Court, or otherwise, as he thinks fit, assign the bond or other security to some proper person, and that person shall thereupon be entitled to sue thereon in his own name as if it had been originally given to him instead of to the Judge of the Court, and to recover, as trustee for all persons interested, such amount as may be recoverable thereunder

417 Security —When there are rival claimants and a certificate is issued under cf. (3) of sec. 373 to a person who has prima face the best title the Court shall require security bond with one or more sureties to be given as a condition precedent to the granting of the certificate. This is expressly provided in this section and the section leaves no discretion to the Court in this matter—Rajam Chetty v Eddlapalit 11 M.L.T. 384 14 IC 303 If the question of title is in doubt the Court should decide it on prima face grounds to the best of its ability give a certificate accordingly and take security—Rukman v Sam Das 137 P.R. 1907 If the application for certificate is opposed by a person who claims some of the debts due to the deceased then even though the Judge dismisses the claim of such person he can properly order the grantee of the certificate to furnish security for the indemnity of that person—Ram Raj v Brij Nath 35 All 470 (471) II A.L.J. 37 2 IC 889

Where the certificate is not issued under clause (3) or (4) of sec 373 the Court has a discretion to require security to be given. Where there are several claimants and a dispute anisk as to the grant of a certificate the Court may ask for security from the applicant to whom the certificate is granted—Assem V. Amerian 12 W.R. 38. If the person entitled to collect the debts of the deceased is a minor applying through his guardian it is improper for the Court to grant certificate to the guardian without requiring "security—Guilabchand V. Moti. 25 Bom 523 (526). Where a certificate is granted to a minor applying through his guardian or next friend the bond shall be executed by the guardian or next friend on behalf of the minor—Krishmamecharlis v. Venkammah 36 Mad 214 (215). In re Sundrads 101 IC 166. A IR 1927 Sund 187 (190)

When a certificate is granted to a Hindu widow the Court may take security for rendering accounts-for Der v Banuars 35 All 249 (250) (cited under sec 374) Gulian v Jugdeo 28 All 477 (478) see also Sundarammal v Kullappa 5 MLJ 36 If the widow applies for a certificate to enable her to continue the suit which was already brought by her husband against the debtor and the application is opposed by the deceased's brothers who claim the debt by survivor ship the proper order is to grant a certificate to the widow conditional on her furnishing security and not to refer the parties to a suit-Kahn Deil v Salamat AIR 1930 Lah 700 126 IC 440 But it is not obligatory on Courts to demand ecurity whenever a Hindu widow applies for the grant of a certificate-Chinngsgiems v Ponna Ammal 2 L.W 352 28 I C 638 (639) The Allahabad High Court lays down that in the ordinary way a Hindu widow ought not to be called upon to give security at all No doubt there are many reversioners who are interested but it is not the business of the Court to go out of its way to look after the reversioners who have no vested interest, and to assume everything against the widow. The mere fact that the Judge thinks that the widow may possibly give away -ie estate to her relatives or to a religious institution (for which there is a proper remedy for the reversioners) is not a reason for creating an obstacle in her way by demanding security and thus making it difficult for

her to obtain the certificate-Kausilla v Sukhder 21 ALJ 452 AIR 1923 All 579 (580) 74 I.C. 761 Naram Der v. Parmeshwari 40 All 81 (83 84) 42 IC 941 15 ALJ 881 Where the application for a succession certificate put in by the widow was opposed by her husband's brother but the District Judge found that the brother was divided it was held that certificate could be granted to the widow without demanding any security from her-Chinnasaumi v Ponna Ammal supra The Nagpur Court however ordered security in such a case-Champalal v Lahersbas 57 IC 641 (643) An order for security should not be passed unless it is proved to the satisfaction of the Court that there is a reasonable apprehension of waste or other danger on the part of the widow-Shib Dei v Andhya 9 IC 571 (572) (All) or that there are other exceptional circumstances-Narain v Parm'shuari 40 All 81 (83) 42 IC 941 If the widow fails to furnish security the Judge may refuse to grant her a certificate at all but it would be improper for him to grant a limited certificate entitling her only to enjoy the interest of the money See Kesho Ram v Ram Augr 32 All 316 (319)

Where a Judge acting under this section requires security to be furnished by a person to whom a certificate is granted the amount of the security should be specified in the order and a time should be prescribed within which the security should be furnished—Gultaji v Jugdeo 23 All 477 (478) But the Court ought not to put obstacles in the way of the applicants by demanding excessive security which they are unable to furnish but should endeavour as far as possible to assist them and put them in a postion to recover the debts. In a proceeding for succession certificate if there is no risk of the applicants wasting the assets or defeating the claims of creditors the Court should require a purely nominal security and grant the application Otherwine the applicants who may be per fectly honest and are applying bona fide will not be able to furnish the security required by the Court and will be unable to obtain the certificate and the debtors vill escape payment—Porna heer v Chinni Lal 14 AL J 654 35 IC 718

The security may take the shape of a bond for the amount of the debts due to the estate of the deceased for which the certificate is granted with one or more surety or surctus or such other sufficient security as the Judge may think to be proper. If the applicant is a Hindu widow the Judge may accept the security of the interest of the applicant in any immoveable property inherited by her from ther deceased bu band—Gulfery V Judge 28 All 477 (478)

A person who has given security and executed a bond under this section cannot be relieved of his hisbility so long as the certificate holds good— $\hbar amal\ Dm$  v Hairm 5 PLR 1901

418 Sub section (2)—Assignment of bond —C! sec 292 and notes thereunder A person intending to sue on the security bond must get as assignment of the bond in his name otherwise his suit is not maintainable—

Mayon v Chathabban 14 Mad 473 (476)

376 (1) A District Judge may, on the application Section 10

Extension of certi of the holder of a certificate under Act VII
this Part, extend the certificate to any
such extension shall have the same effect as if the debt or
security to which the certificate is extended had been
originally specified therein.

(2) Upon the extension of a certificate, powers with respect to the receiving of interest or dividends on, or the negotiation or transfer of, any security to which the certificate has been extended may be conferred, and a bond or further bond or other security for the purposes mentioned in section 375 may be required, in the same manner as upon the original grant of a certificate

419 The District Judge can extend a certificate only on the application of the certificate holder and not of any other person (e.g. an assignee). Thus A obtained a certificate and assigned a pro-note not included in the schedule to B and B applied for extension of the certificate to the pro-note held that the Judge could not grant the extension—Rojah of Kalahasti v. Rama Rayamentar 19 N.L.1 45.5 3 1 C. 84 (85)

Section 11 Act VII of 1889 377 Certificates shall be granted and extensions of certificate and extended certificate and extended certificate as circumstances admit, in the forms set forth in Schedule VIII

Section 12 Act VII of 1889 378 Where a District Judge has not conferred on the Amendment of certs ficate in respect of power as to securities.

Temperatures.

to receive interest or dividends on, or to negotiate or transfer, the security, the *Judge may*, on application made by petition and on cause shown to his satisfaction, amend the certificate by conferring any of the powers mentioned in section 374 or by substituting any one for any other of those powers

Section 14 Act VII of 1889

- 379 (1) Every application for a certificate or for Mode of collecting the extension of a certificate shall be court less on certificates accompanied by a deposit of a sum equal to the fee payable under the Court-fees Act, 1870, in respect of the certificate or extension applied for
- (2) If the application is allowed the sum deposited by the applicant shall be expended, under the direction of the Judge, in the purchast of the stamp to be used for denoting the fee payable as aforesaid
- (3) Any sum received under sub-section (1) and not expended under sub-section (2) shall be refunded to the person who deposited it
- 420 Whenever a fresh succession certificate is taken even though it is to collect debts for which a certificate has already been taken out and the duty paid the duty prescribed by the Court Fee. Act must be again paid Thus where the widow of a deepa ed Hipdu took a certificate in respect of certain

debts due to the deceased and after her death the daughter of the deceased applied for a fresh certificate m respect of the debt and urged that the stamp duty upon the debts having once been already paid by the widow she was not bound to pay the duty again held that the stamp duty was payable again—In re Saroje Bashini 20 CWN 1125 (1128) 36 IC 125 Sub section (2) provides that whenever an application for succession certificate is allowed and the Court has passed its order for the issue of the certificate to the petitioner the amount of the depost paid by him into Court becomes at once legally appropriated as duty to the extent of the debt covered by the order and cannot be refunded But if no order for a grant is made a refund can be made to the person who has deposited the amount—Sarkara v Namar 21 Mad 241

380 A certificate under this Part shall have effect Section 15 Local extent of certi throughout the whole of British India Art VII ficate

This section shall apply in British India after the separation of Burma and Aden from India to certificates granted in Burma and Aden before the date of the separation, or after that date in proceedings which were pending at that date

Note —The stalicised portion in the section has been added by the Government of India (Adaptation of Indian Laws) Order 1937

381 Subject to the provisions of this Part, the cer-section 18 Effect of certificate of the District Judge shall ArtVII of 1889 with respect to the debts and securities specified therein, be conclusive as against the persons owing such debts or liable on such securities, and shall, notwith-standing any contravention of section 370, or other defect, afford full indemnity to all such persons as regards all payments made, or dealings had, in good faith in respect of

certificate was granted Compare sec 273 and notes thereunder

421 Effect of certificate —The grant of a certificate gives to the grantee as title to recover the debt due to the deceased and payment to the grantee is a good discharge of the debt.—Muthar v Ramanathan 1918 MVN 242"43"1C"592"(973) "Sharafar v Khurshed 49 IC 958 This section is conclusive of the right of the holder of the certificate entitling him to collect any part of the debt due to a deceased person and to sue for recovery of that part and if the suit was already commenced by the deceased the certificate entitles the holder to continue the suit.—Meenatchis v Ananthanarayana 26 Mad 224 (229) If the certificate is granted in respect of a part of the debt the certificate is entitled to use for recovery of that part. If the persons entitled to the other part refuse to join in the suit as coplaintifs, they can be impleaded as defendants—Shib Ram v Muhammad 29 PR 1899 Mehr Chand v Syed Muhammad 39 PR 1898 A succession certificate duly granted by the District Court is conclusive against debtors of the deceased person and it is not open to the judgment debtors to raise any objection to the execution of the decree by

such debts or securities to or with the person to whom the

persons who hold a succession certificate to the deceased decree holder on the ground that they are not the heirs of the deceased decree holder—Pean Lal v Jhabba Lal A IR 1925 All 66 (67) 82 IC 601 Charan Das v Nathu Mal A IR 1934 Lah 79 148 IC 240 The grant of a succession certificate is conclusive against the debtor Even if another person turns out of be the heir of the deceased it does not follow that the certificate is invalid—Paramananda chary v Veerappan 39 MLT 611 A IR 1928 Mad 213 IOT IC 431 Where an heir of the deceased obtains a certificate a debtor cannot refuse to pay the debt on the ground that a s.ii. regarding the devolution of the property of the deceased is pending—Sthambarat adula v Thiruphakadanatha 39 MLT 405 106 IC 125 A IR 1928 Mad 56 (57) The person who is granted a certificate acquires conclusive title under this section to recover the debts due to the deceased and if anybody refuses to pay debts to him he acts wrongly and as such must pay interest—Oriental G S Life Assurance Ltd v Vanteddu 35 Mad 162 (167)

But a grant of certificate does not constitute the proof of the debt nor does it determine the frame of a suit in which the claim has to be enforced. The certificate only renders unnecessary the trial of the question whether the claimant is entitled to maintain it as the representative of the deceased-Mohamed Abdul v Sanjan 16 CWN 231 (233) 12 IC 593 15 CLJ 384 The certificate does not give any general powers of administration of the estate of the deceased but is confined only to the collection of debts which were in existence at the life time of the deceased-Charusila v Jyotish 33 IC 157 (159) The grant of a certificate does not establish the title of the grantee as the heir of the deceased but only furnishes him with an authority to collect the debts and allow the debtors to make payments to him without incurring any risk-Ram Saran v Gabbu 71 PWR 1916 33 IC 603 (604) The certificate only authorises the grantee to collect the debts but it does not even establish the right of the grantee to the debts-Isgrs Begum v Syed Als 5 CWN 494 (497) nor does it entitle the holder thereof to recover possession of properties either moveable or immoveable-Afohabir v Lala Baldeo 1 IC 205 (206)

But it should be noted that this section affords protection to debtors paying heir debt to the certificate holder if the debt was due to the state of the deceased and not due to third persons. If the debt was due to a third person then inspite of the certificate it would be open to that person to sue the debtor and prove that the debt is due to him and if such person can prove it the debtors defence that he had paid the debt to the certificate holder would not protect him because the protection afforded by this Act is in respect of debts due to the deceased and not those due to third parties—Bai Kashi v Parbhu 28 Bom. 119 (123)

The only effect of this section is that if the debt remained unpaid up to the grant of the certificate the certificate is conclusive and compels the debtor to pay it to the certificate holder. But where the debtor has paid the debt before the grant of the certificate to the person really entitled to the debt (other than the holder of the certificate) the payment affords a complete defence to a suit by the certificate holder—Auchu Ijer v Ventuu Ammall 50 MLJ 432 AIR 1926 Mad 407 (408) 93 IC 360 following Parishotam v Ranchol 8 BHCR AC 152 (FB)

Where one of the heirs of a deceased decree holder obtains a succession certificate in respect of the decree he is entitled to maintain an application for the execution of the decree and the judgment debtor cannot go behind the terms of the certificate holder alone is not

competent to execute the decree in the absence of several other heirs of the deceased—Golam Khalik v. Tasaddak 28 C.L.J. 299 46 I.C. 890 (892)

A certificate is conclusive as against the debtors and can only be revoked under sec 383 by the District Judge. No suit lies for a declaration that a certificate granted by the Judge has been obtained by false evidence and to set aside a d cree obtained by means of such certificate—Rupan v Bhagelu 36

All 423 (424) 25 I C 320

The position of a holder of a certificate who has to collect the debts due to a minor cannot be compared to that of a certificated guardian. Such a certificate holds good until the minor takes steps to revoke it on coming of age So it does not follow that the moment the minor becomes 18 years of age the certificate is no longer valid and that if payment is made to the holder it is made to an unauthorised person—Ganpaya v Krishnappa 26 Bom LR 491 80 IC 422 AIR 1924 Bom 394

th a age the

Where therefore a person brought a suit on a mortgage executed in favour of his deceased brother and produced a succession certificate

Held that the production of a succession certificate was not a sufficient tien on which to sue on the mortgage—Ramu Singh and others v Aghori Singh and others A IR 1938 Pat 68

Provident Fund if debt or security —Sec 381 does not apply to the Provident Fund of a Railway Company as such fund is neither a debt nor a secunity payable to the employee as mentioned in the section—Assam Bengal Ry Co v Atul Chandra A1R 1937 Cal 314

422 Retrospective effect —Where a plaintiff fails to produce a succession certificate within the time allowed by the trial Court and his suit is therefore dismissed he cannot by obtaining a certificate at the appellate stage claim to have retrospective effect thereof—Assiman v. Makku. 49 All I 24 AL J 888 96 I C. 478 AI R 1927 All 227 (228) following Fatch Chand v. Md Bakh. 16 All 259 (256) (FB)

382 Where a certificate in the form, as nearly as Section 17 feet of certificate circumstances admit, of Schedule VIII Act VII of 1889

Effect of certificate granted or extended by British representative in Foreign State has been granted to a resident within has Foreign State by the British representative accredited to the State, or

where a certificate so granted has been extended in such form by such representative, the certificate shall, when stringed in accordance with the provisions of the Court-fees Act 1870, with respect to certificates under this Part, have the same effect in British India as a certificate granted or extended under this Part

423 A true copy of probate signed by the Political Agent of a Nature State is not a certificate granted by a British representative within the meaning of the section. There is nothing to show that the Political Agent when he affixed his signature to the true copy of the probate intended to grant such certificate as is required by this section. He affixed his signature merely with

reference to sec 86 of the Evidence Act-Manasing v Amad Kunhi 17 Mad 14 (16)

A certificate granted by a Political Agent is not invalid merely because the applicant had not given to the Political Agent the necessary information as to the other relatives of the family, and no notice had been issued to them. These irregularities may be reason for the Political Agent to cancel the grant but they do not enable the District Judge to treat it as a nullity—Annapiniabat v. Latshiman 19 Bom 145 (148). A certificate mentioned in this section if stamped with the proper stamp has the same effect as a certificate granted under this Act and sec 385 precludes the grant of another certificate by a Court in British India—Bud (at p. 149).

ection 18 Act VII of 889 383 A certificate granted under this Part may be Revocation of certificate revoked for any of the following causes, namely —

(a) that the proceedings to obtain the certificate were

defective in substance,

(b) that the certificate was obtained fraudulently by the making of a false suggestion, or by the concealment from

the Court of something material to the case,

(c) that the certificate was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant thereof, though such allegation was made in ignorance or inadvertently,

(d) that the certificate has become useless and in

operative through circumstances,

(e) that a decree or order made by a competent Court in a suit or other proceeding with respect to effects comprising debts or securities specified in the certificate renders it proper that the certificate should be revoked

Compare section 263 ante and Notes thereunder

424 The revocation must be ordinarily made by the same Judge who granted the certificate if he is still in the District Thus where a Sub Judge who find been invested with the powers of a District Judge under sub-section (1) of sec 388 granted a certificate the revocation must be made by the Sub Judge if he is still exercising the powers of District Judge The District Judge has in such circumstances no jurisdiction to make the revocation evcept where the case having been instituted and pending before the Sub Judge has been withdrawn by the District Judge to his own Court under sub-section (4) of sec 388—Sukhaa v Secretary of State 19 CWN 551 (552) 27 IC 821

The fact that no appeal has been preferred against the order of the Judge granting the certificate is no bar to its resocution at any time when the cir cumstances enumerated in this section are proved—Sukhia v Secretary of State supra

The District Judge may of his own motion revoke a certificate but as a general rule the Court must be moved by an application by the parties interested in the revocation—Manchharam \( \) Acides 19 Bom 821 (826)

A certificate can be revoked by the Judge on the ground that he had

granted it under a mistake of fact-Manchharam v Kalidas 19 Bom. 821 (826) The Judge can revoke a certificate under clause (b) on the ground that a previous certificate had been granted to other persons in respect of the same debt and that the subsequent grantee concealed from the Court the fact of the previous grant-Manchharam v Kalidas 19 Bom 821 (827) Where a certi ficate had been granted without issuing notice to a party preferentially entitled and the schedule of debts attached to the application for certificate contained certain items of debts which accrued due after the death of the deceased and the application did not mention the names of certain nearer relatives held that the certificate must be revoked on the grounds enumerated in clauses (a) and (b) of this section-Damini v Fatumani 5 PLT 564 79 IC 639 AIR 1924 Pat 520 (521) Where notice of the application for a certificate had been given to a minor's father on behalf of the minor but it appeared that the interest of the father was opposed to that of the minor as he himself was the debtor held that the proceedings were seriously defective within the meaning of clause (a) and the certificate should be revoked-Sharifunnissa v Masum Ali 42 All 347 (352) 56 IC 380

If a certificate has once been granted in respect of the entire debt and circumstances have subsequently changed to as to bring clause (d) or (e) into operation it is open to the Court to partially revoke the certificate originally granted or to modify the terms of the grant—Sharifunnissa v Masum Ali 42 Ali 347 (353)

Where a succession certificate is obtained on behalf of a minor by his next friend on allegations which were false as to the deceased's property and on allegation which in law would not justify the grant and by fraudulent conceal ment of material facts from Court the grant can be revoked—Maahhu Krishna In re 177 1C 416 A IR 1898 Smd 160

Right to apply under —Person claiming under a will falling under sec 57 (c) who had not obtained probate See Succession Act secs 57 (c) 213 and 383—1938 AWR (HC) 634

384 (1) Subject to the other provisions of this Part, Section 19

Appeal an appeal shall lie to the High Court Art VII of from an order of a District Judge granting, refusing or revoking a certificate under this Part, and the High Court may, if it thinks fit, by its order on the

granting, refusing or revoking a certificate under this Part, and the High Court may, if it thinks fit, by its order on the appeal, declare the person to whom the certificate should be granted and direct the District Judge on application being made therefor, to grant it accordingly, in supersession of the certificate, if any, already granted

- (2) An appeal under sub-section (1) must be preferred within the time allowed for an appeal under the Code of Civil Procedure, 1908
- (3) Subject to the provisions of sub-section (1) and to the provisions, as to reference to and revision by the High Court and as to review of judgment of the Code of Civil Procedure, 1908, as applied by section 141 of that

Code, an order of a District Judge under this Part shall be final

425 Appeal —An appeal lies from an order granting a certificate and the fact that the ground of appeal also furnishes a ground for revocation of the certificate (ir. that notice had not been served on the appellant before granting certificate) is not a ground for holding that he must seek his remedy only by way of an application for revocation and not by preferring an appeal—Bindo v Radhe Lal 42 All 512 (513) 56 IC 181

The extension of a certificate under sec 376 to additional debts is not an order granting a certificate so as to give a right of appeal against such exten sion-Venkatesu arulu v Brahmarai utu 25 Mad 634 (635) The Calcutta High Court is of opinion that an order granting an application for extension of a certificate may not be equivalent to an order granting a certificate (as held in the Madras case) but an order refusing an extension is tantamount to an order refusing to grant a certificate and is appealable-Radha Raman v. Gopal 27 CWN 947 (distinguishing 25 Mad 634) An appeal lies from an order granting a certificate for collection of part of the debts-Shitab Debi v Debi Prasad 16 All 21 (22) An order refusing to grant a certificate is appealable under the express terms of this section. See also Gujri v. Nata Singh. 117 P.R. 1881. Baga Singh v Ahera 58 PR 1883 Muzastar v Rahim 78 PR 1886 The contrary view taken in Ram Chand v Rukman 103 PR 1888 (FB) (decided under Act XXVII of 1860) is no longer good law. Where an applicant applied to the District Court asking either that a certificate already granted to one H should be revoked and a fresh certificate made out in the name of the applicant or in the alternative that the name of the applicant should be associated with that of H in the same certificate and the District Judge rejected her application held that the order of the Judge was in effect one refusing to grant a certificate and was appealable-Sharifunnissa v Masum Ali 42 All 347 (350) 18 ALJ 314 56 IC 380

An appeal hes against an order refusing to revoke a certificate in the same way as an appeal hes against an order revoking a certificate—Manchharam v Kalidas 19 Bom 221 (825)

There is no right of appeal where the order of the District Court is either conditional or provisional and does not eventuate in a final order eg an order for the appointment of a receiver for the collection of debts pending the decision of the proceeding for grant of certificate—Kankanya v. Kankanya Lal 45 All 372 (374) 22 ALJ 345 AIR 1924 All 376 79 IC 363

Where the Judge passes an order that a certificate be granted on condition of security being furmshed by the applicant it is not an order granting or refusing to grant a certificate but is in the nature of a preparatory or inter locatory order (which does not become final until the Court actually grants or refuses the certificate upon furmshing or failure to furmsh the security as the case may be) and is not appealable—Nanha v Gulabo 26 All 173 (175) (dissenting from 20 Mad 442 5 ML J 28 and 25 Cal 320) Aunjumn x Aongathil 7 MLT 246 1910 MWN 265 6 IC 599 Bat Dexkore v Lulchard 19 Bom 790 (793) Gaurn v Mankar 2 AL J 606 Dalay v Jagdat 5 OC 213 (215) (following 19 Mad 199) Bhagwam v Manna Lal 13 All 214 In repair of the Common of the Co

preferred against that part of the order as relates to security and such an appeal cannot he—Rama Reddi v Papi Reddi 19 Mad 199 (200). But the contrary view prevails in various cases that an order of grant of certificate is not the less an order because there is a condition attached to it that security is to be given by the person in whose favour it is made. It is still an order and therefore appealable—Radha Rami v Brindaban 25 Cal 320 (321) (dissenting from 13 All 214) Arija v Thangammal 20 Mad 442; Bris v Barkhurdar 4 PLR 1908 139 PR 1908. An order that a certificate be granted on security being furnished is an order granting a certificate though it is intended to take effect on the security being furnished and is appealable—Venkatasami v Chinna 5 MLJ 28 (dissenting from 13 All 214). It is stantamount to an order granting certificate accompanied by a condition that security should be given and is consequently appealable—Rai Nandkore v Magan Lal 36 Bom 272 (273) 13 Bom LR 1208 12 IC 2908.

By virtue of this section read with sec 390 an appeal lies from an order refusing to grant a certificate of heirship under Reg VIII of 1827—Rangubar v Abai 19 Bom 399 Jeremal v Na ir 18 Bom 748 An appeal lies from an order of the Court of the Agent of the Governor of Vizagapatam in the same way as from an order of a District Judge—Gurianaya v Chandra Sekhar 31 Mad 362

In ca.es where an appeal is prohibited by this section no appeal lies as to costs alone—Ram Ghulam v Shib Dm 1892 AVN 35 No appeal lies as regards the form of a certificate—Banee Madhab v Nilambar 7 VR R. 376 No appeal lies with reference to the amount of security which the Judge may think right to demand from an applicant—Ramohinee v Dimbodand 17 WR 566

428 To which Court — An appeal from an order of a Munsi invested under sec 388 with the functions of a District Court lies to the District Judge only and the District Judge cannot transfer the appeal for hearing to any sub ordinate Court (eg the Court of the Sub Judge or the Court of a Judge of Small Causes)—Huran v Hingan 34 All 148 (149) 12 IC 926 8 Al J 1300 An appeal from an order of a Sub Judge exterising the functions of a District Court lies to the District Judge and not to the High Court (side sec 388 subsection 2 proviso)—Sukhine v Secretary of State 19 CWN 551 (552) Mahabir v Jos Ram 2 Lah LJ 312 Basti Begam v Saulat 16 OC 197 21 IC 388 Instand Day Mangel Day 121 PWR 1917 41 IC 640

In Punjab by a Government Notification all District Judges and Subordinate Judges of the 1st and 2nd class have been invested with the functions of a District Court An appeal from orders passed by such District Judge or Sub Judge lies to the Divisional Court and not to the Chief Court (under proviso to sub section 2 of sec. 388)—Tikaya v Lauria 124 PR 1890.

No Second Appeal —There is in this Act no provision for a second appeal in any case Both sec 384 and sec 388 declare that the orders of the District Court shall be final. The use of the words subject to the other provision of this Act in sec 384 and the omission of those words in ec 388 (3) are significant. The intention of sec, 388 (3) is to confer on the District Court the same appellate jurisdiction over an order of an inferior Court as is conferred by sec 384 on the High Court over the order of a District Court. There is no second appeal to the High Court against the order of a District Judge passed on appeal from the order of a subordinate Court. The word final in sec 388 (3) is intended not only to preclude a suit but also to preclude any further appeal—Subba Rao v Palanandit. If Mad 167 (168)

ministration

Section 20 Act VII of 1889 385 Save a Effect on certificate of previous certificate probate or letters of ad

Save as provided by this Act, a certificate granted thereunder in respect of any of the effects of a deceased person shall be invalid if there has been a previous grant of such a certificate or of

probate or letters of administration in respect of the estate of the deceased person and if such previous grant is in force

427 If a probate has been granted in respect of the estate of the deceased the Judge is not competent to grant a succession certificate; he is not entitled to ignore the probate and to go into the question whether the probate infilled certain requirements or to hold that the deceased was not legally competent to make the will of which the probate was granted—Hari Chand v. Hartopal 125 IC 322 A I R 1930 Lah 574 (575) The case of course would be otherwise if the succession certificate relates to certain properties which were not included in the will and the probate—Ibid

Section 22 Act VII of 1889 386 Where

Valuation of certain payments made in good faith to holder of invalid certificate

Where a certificate under this Part has been superseded or is invalid by reason of the certificate having been revoked under section 383, or by reason of the grant of a certificate to a person named

ir an appellate order under section 384, or by reason of a certificate having been previously granted, or for any other cause, all payments made, or declings had, as regards debts and securities specified in the superseded or invalid certificate, to or with the holder of that certificate in ignorance of its supersession or invalidity, shall be held good against claims under any other certificate

Compare lection 297 ante and notes thereunder

4 427A Intalid —A certificate is not invalid even if another person turns out to be the heir of the deceased. The certificate is conclusive against the debtor and he is protected under sec 381 if he pays the debt to the certificate holder—Paramanandachary v Veerappan 39 MIT oil 107 IC 431 AIR 1928 Mad 213

Section 25 Act VII of Effect of decisions under this Part and ha bility of holder of certificate thereunder

No decision under this Part upon any question of right between any parties shall be to be the trial of the same question of earlier of earlier ceeding between the same parties, and the Part shall be construed to affect the liability.

nothing in this *Part* shall be construed to affect the hability of any person who may receive the whole or any part of any debt or security or any interest or dividend on any security, to account therefor to the person lawfully entitled thereto

428 Proceedings under the Succession Certificate Act are of a summary nature and the decision of a Court as to any question of right between the

parties is in no way final or binding between the parties and does not but the trial of the same question in any other proceeding between the same parties—
Multi Das V Achut Das 5 Lah 105 (109) 92 I C-138 A I R 1924 Lah 493
Rattan Singh V Chaudhuri Ray Singh 2 Lah 1, 578 68 I C 302, Ram Saran
V Gaphu 71 PW R 1916 33 I C 603 (604) Jigri N Syrd Ali 5 C WN 494
(497) Thus a finding as to the ab ence of relationship between the applicant and the deceased in proceedings under the Succession Certificate Act is not a bar to the trial of the same question (112 the question of relationship) in a proceeding under see 278 for letters of administration—Misri Lat V Ashrafi
A IR 1925 (outh 670 88 IC 612

388 (1) The *Provincial* Government may, by notifica- Section 26 tion in the official Gazette invest any Act VII of 1880

Investiture of inferior Courts with jurisdiction of District Court for purposes of this Act Court inferior in grade to a District Judge with power to exercise the functions of a District Judge under this Part

(2) Any inferior Court so invested shall, within the local limits of its jurisdiction, have concurrent jurisdiction with the District Judge in the exercise of all the powers conferred by this Part upon the District Judge, and the provisions of this Part relating to the District Judge shall apply to such an inferior Court as if it were a District Judge

Provided that an appeal from any such order of an inferior Court as is mentioned in sub section (1) of section 384 shall lie to the District Judge, and not to the High Court, and that the District Judge may, if he thinks fit, by his order on the appeal, make any such declaration and direction as the sub-section authorises the High Court to make by its order on an appeal from an order of a District Judge

(3) An order of a District Judge on an appeal from an order of an inferior Court under the last foregoing subsection shall, subject to the provisions as to reference to and revision by the High Court and as to review of judgment, of the Code of Civil Procedure, 1908, as applied by

section 141 of that Code, be final

(4) The District Judge may withdraw any proceedings under this Part from an inferior Court, and may either himself dispose of them or transfer them to another such Court established within the local limits of the jurisdiction of the District Judge and having authority to dispose of the proceedings

(5) A notification under sub-section (1) may specify any inferior Court specially or any class of such Courts in

any local area

- (6) Any Civil Court which for any of the purposes of any enactment is subordinate to or subject to the control of, a District Judge shall, for the purposes of this section, be deemed to be a Court inferior in grade to a District Judge
- 429 Inferior Courts —A Civil Judge is not inferior to a District Judge and cannot be invested with the functions of a District Court under this section—Hiralal v. Khushaliram 15 CP1R 54 A Sub Judge invested with the function of a District Court has jurisdiction to hear and determine an application made under sec 2 Bombay Reg. VIII of 1827—Plumbar v. Ishvar. 17 Bom. 230 (231) A Sub Judge of the second class invested with the functions of a District Court under this section can entertain an application for certificate in respect of a debt exceeding Rs. 5000—Rattan Singh v. Chaudhuri Raj Singh 2 Lah L J. 578 68 1 C. 302

Under clause (4) a District Judge can withdraw a case to his own Court but that power can be exercised only when the case is pending decision.—Sukhia

v Secretary of State 19 CWN 551 (552) 27 I C 821

Where the senior Sub Judges have been invested with powers to hear applications under the Succession Act but they have not neen so empowered by a Notification of the Provincial Government published in the official Gazette as required by sec 388 the normal course of appeal laid down in the N W P P Courts Regulation is therefore not affected and the appeal from an order made by the Senior Sub Judge on an application under the Succession Act hes to the Judicial Commissioner's Court and not to the Court of the District Judge—Durga Deix Nap Chand 177 IC 705 A.I.R 1938 Pesh 62

As regards appeals from inferior Courts see Notes 426 under sec 384

Section 27 Act VII of 1889 Surrender of supersed ed and invalid certificates under this Part has been superseded or is invalid from any of the causes mentioned in section 386, the holder thereof shall, on the requisition of the Court which greated it deliver it in to that

sition of the Court which granted it, deliver it up to that Court

(2) If he wilfully and without reasonable cause omits so to deliver it up he shall be punishable with fine which may extend to one thousand rupees, or with imprisonment for a term which may extend to three months, or with both

Compare sec 296 ante

Section 28 Act VII of 1889 390 Notwithstanding anything in Bombay Regula tion No VIII of 1827, the provisions of section 370, sub-section (2), section bay Regulation VIII of 372, sub-section (1), clause (1), and 1827 sub-section (1), clause (1), and sees 374, 375, 376, 377, 378, 379, 381,

383, 384, 387, 388 and 389 with respect to certificates under this *Part* and applications therefor, and of section 317 with respect to the exhibition of inventories and accounts by excutors and administrators, shall, so far as they can be made applicable, apply, respectively, to certificates granted under that Regulation, and applications made for certificates thercunder, after the 1st day of May 1889, and to the exhibition of inventories and accounts by the holders of such certificates so granted

An order refusing to grant a certificate of heirship under Bombay Reg VIII of 1827 is appealable see 18 Bom. 748 and 19 Bom 399 cited under sec 384 at page 409 ante

# PART XI

# MISCELLANEOUS

Savings.

391 Nothing in Part VIII, Part IX Section 149 or Part X shall—

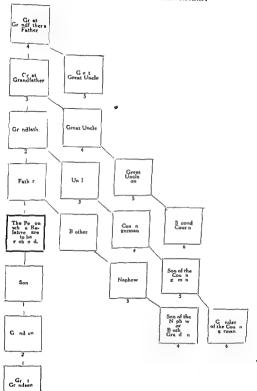
- (1) validate any testamentary disposition which would otherwise have been invalid,
- (11) invalidate any such disposition which would otherwise have been valid.
- (iii) deprive any person of any right of maintenance to which he would otherwise have been entitled, or
- (10) affect the Administrator General's Act. 1913

Repeals

392 [Repealed by the Repealing Act XII of 1927]

# SCHEDULE I

(See section 28 )-TABLE OF CONSANGUINITY



#### SCHEDULE II

#### PART I

#### (See section 54)

- (1) Father and mother
- (2) Brothers and sisters (other than uterine brothers and sisters) and lineal descendants of such of them as have predeceased the intestate
  - (3) Paternal grandfather and paternal grandmother
- (4) Children of the paternal grandfather and the lineal descendants of such of them as have predeceased the intestate
  - (5) Paternal grandfather's father and mother
- (6) Paternal grandfathers fathers children and the lineal descendants of such of them as have predeceased the intestate

#### PART II

#### (See section 55)

- (1) Father and mother
- (2) Brothers and sisters (other than uterine brothers and sisters) and lineal descendants of such of them as shall have predeceased the intestate
  - (3) Paternal grandfather and paternal grandmother
- (4) Children of the paternal grandfather and the lineal descendants of such of them as have predeceased the intestate
  - (5) Paternal grandfather s father and mother
- (6) Paternal grandfather s father s children and the lineal descendants of such of them as have predeceased the intestate
- (7) Uterine brothers and sisters and the lineal descendants of such of them as have predeceased the intestate
  - (8) Maternal grandfather and maternal grandmother
- (9) Children of the maternal grandfather and the lineal descendants of such of them as have predeceased the intestate
  - (10) Widows of brothers or half brothers.
  - (11) Paternal grandfathers sons widow
  - (12) Maternal grandfather s son s widow
- (13) Widowers of deceased lineal descendants of the intestate who have not married again before the death of the intestate
  - (14) Maternal grandfather's father and mother
- (15) Children of the maternal grandfathers father and lineal descendants of such of them as have predeceased the intestate
- (16) Children of the paternal grandmother and the lineal descendants of such of them as have predeceased the intestate
  - (17) Paternal grandmother's father and mother
- (18) Children of the paternal grandmother's father and the lineal descendant of such of them as have predeceased the intestate

#### SCHEDULE III

(See section 57)

PROVISIONS OF PART VI APPLICABLE TO CERTAIN WILLS AND CODICILS
DESCRIBED IN SECTION 57

Sections 59 61 62 63 64 68 70 71 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 99 69 59 89 81 101 102 103 104 105 106 107 108 109 110 111 112 113 114 115 116 117 119 120 121 122 123 124 125 126 127 128 129 130 131 132 133 134 135 136 137 138 139 140 141 142 143 144 145 146 147 148 149 150 151 152 153 154 155 156 157 158 159 160 161 162 163 164 165 166 167 168 169 170 171 172 173 174 175 176 177 178 179 180 181 182 183 184 185 185 187 188 189 and 190

[The figure 117 has been inserted by sec 14 of the Transfer of Property Amendment (Supplementary) Act XXI of 1929 [

Restrictions and modifications in application of foregoing sections

1 Nothing therein contained shall authorise a testator to bequeath property which he could not have alienated inter vivos or to deprive any persons of any right of maintenance of which but for the application of those sections he could not deprive them by will

2 Nothing therein contained shall authorise any Hindu Buddhist Sikh or Jaina to create in property any interest which he could not have created before the first day of September 1870

3 Nothing therein contained shall affect any law of adoption or intestate

succession
4 In applying section 70 the words than by marriage or shall be omitted

5 In applying any of the following sections namely sections 75 76 105 109 111 112 113 114 115 and 116 to such wills and coducils the words son sons child and children shall be deemed to include the children whether adopted or natural born of a child whether adopted or natural born and the expression daughter in law shall be deemed to include the wife of an adopted son.

[Para 1 corresponds to sec 3 of the Hindu Wills Act 1870 and to sec 154 of Act V of 1881 Para 5 corresponds to sec 6 of the Hindu Wills Act ]

#### SCHEDULE IV

[See section 274 (2) ]

FORM OF CERTIFICATE

I A B Registrar (or as the case may be) of the High Court of Judicature at (or as the case may be) hereby certify that on the day of the High Court of Judicature at (or as the case may be) granted probate of the will (or letters of administration of the estate) of CD late of deceased to E F of and G H of and that such probate (or letters) has (or have) effect over all the property of the deceased throughout the whole of British India

#### SCHEDULE V

ISee section 284 (4) 1

FORM OF CAVEAT

Let nothing be done in the matter of the estate of A. B. late of deceased who died on the day of notice to C D of

Judge of the District of

without

[or Delegate appointed

#### SCHEDULE VI

(See section 289)

FORM OF PROBATE for granting probate or letters of administration in there insert the limits of

the Delegate's jurisdiction) | hereby make known that on the day in the year the last will of late of a copy whereof is hercunto annexed was proved and registered before me and that administration of the property and credits of the said deceased and in any way concerning his will was granted to executor in the said will named he having undertaken to idminister the same and to make a full and true inventory of the said property and credits and exhibit the same in this Court within six months from the date of this grant or within such further time as the Court may from time to time appoint and also to render to this Court a true account of the said property and credits within one year from the same date or within such further time as the Court may from time to time appoint

#### SCHEDULE VII

(See section 290)

FORM OF LETTERS OF ADMINISTRATION

Judge of the District of [or Delegate appointed for granting probate or letters of administration in there insert the limits of the Delegate's jurisdiction)] hereby make known that on the letters of administration (with or without the will annexed as the case may be) of the property and credits of late of deceased were granted to the father (or as the case may be) of the deceased he having undertaken to administer the same and to make a full and true inventory of the said property and credits and exhibit the same in this Court within six months from the date of this grant or within such further time as the Court may from time to time appoint and also to render to this Court a true account of the said property and credits within one year from the same date or within such further time as the Court may from time to time appoint

#### SCHEDULE VIII

(See section 377)

#### FORMS OF CERTIFICATE AND EXTENDED CERTIFICATE

#### In the Court of

To A B

Whereas you applied on the day of for a certificate under Part X of the Indian Succession Act 1925 in respect of the following debts and securities namely —

# Debts

Serial number	Name of debtor	Amount of debt in cluding interest on date of application for certificate	Description and date of instrument if any by which the debt is secured

#### Securities

Serial number	Disting guishing number or letter of security  Disting security  Amount or part value of security  Amount or part value of security			Market value of security on date of application for certificate

This certificate is accordingly granted to you and empowers you to collect those debts [and] [to receive] [interest] [dividends] [on] [to negotiate] [to transfer] [those accurates]

Dated this

day of

District Judge

In the Court of O on the application of A B made to me on the

day

of I hereby extend this certificate to the following debts and securities namely ---

#### Debts

Senal number	Name of debtor	Amount of debt in cluding interest on date of application for extension	Description and date of instrument if any by which the debt is secured

#### Securities

		Description		
Senal number	Distin guishing number or letter of security	Name title or class of security	Amount or part value of security	Market value of security on date of application for extension

This extension empowers A B to collect those debts [and] [to receive] [interest] [dividends] [on] [to negotiate] [to transfer] [those securities]

#### SCHEDULE IX

[Repealed by the Repealing Act XII of 1927]

#### MODEL FORMS

#### 1 Will

This is the last will and testament of me Arthur Brownlow of 59 Hungerford S reet in the town of Calcutta

Firstly I direct that all my just debts funeral and testamentary expenses be paid and satusfied by my executrix hereinafter named as soon as conveniently may be after my decease and

Secondly I give devise and bequeath all and every my household furniture linen and wearing appared bools plates pictures china horses carts and carriages and also all and every sum and sams of money which may be in my house or be about my person or due to me at the time of my decease and al.o all other my stocks funds and securities for money book debts money on bonds bills notes or other securities and all and every other my estate and effects vheresoever and whatsoever both real and personal whether in possession reversion remainder or expectancy unto my wife Elizabeth Brownlow to and for her own use and benefit absolutely

And I nominate and constitute and appoint my wife Elizabeth Brownlow to be executive of this my will and hereby revoking all former or other wills and testaments b<sub>I</sub> me at any time heretobefore made I declare this to be my last will and testament

In winness whereof I the said Arthur Brownlow have to this riy last will and te tament set my hand the fitteenth day of December in the year of our Lord one thousand mine hundred and twenty five

Signed by the said testator Arthur Brownlow and achowledged by him to be his last will and testatiment in the presence of us and subscribed by us as witnesses in the presence of the said testator and of each other.

Arthur Brownlow

William Gordon
David Froom
Richard Brownlow

#### 2 Will (Another Form)

- 1 This is the last will and testament of me Beharial Mookerjee of Boinchee in the district of Hooghly I devise my moveable and immoveable property in the following manner —
- 2 I have no son at present. If one or more sons should be born to me hereafter and should have arraved at majority at the time of my death then he or they should be entitled to my properties according to the Shastra
- 3 If my son or sons or any on should be a minor at the time of my death then the whole of my properties shall remain under the Court of Wards until my son or in the ca.e of my having more sons than one until the youngest son has attained majority
- 4 If grand sons or great grand sons of mine should be living at the time of my death they should be the owners of my property according to the Shastras

If no sons grand one or great grand sons of mine should be living at the time of my death then my wife Srimati Kamaley Kamini Debi should be proprietress of the whole of my properties according to the Shastra and shall enjoy the profits thereof during her life time

6 If one or more daughters should be born to me then on the death of my vife the or they and on her or their death my daughter's sons should

be the owners of my property according to the Sha tras

7 If ro daughter or daughters on of mine should be living at the time of the death of my wife then my daughter's daughter Srimati Haridasi Debi shall become the proprietress of my property and shall remain in undisputed posse ion thereof from generation to generation

8 If the death of my wife should take place before my grand daughter caughter's daughter) arrives at majority and bears a son then the whole of the estate shall remain in charge of the Court of Wards until she arrives at

trajority and bears a son

9 If my grand daughter should be barren or a sonless widow or if she would be otherwise di qualified she shall not become entitled to my property but hall receive an allowance of Rs 300 per mensen for life

10 I appoint my wife Srimati Kamaley Kamini Debi as the executrix of this m, will and I further direct that out of my properties the sum of one lakh and fifty thou and be spent in establishing a school and a dispensary in my

village

If no on or daughter should be born to me or if my grand daughter (daughter's daughter) should die before she bears a son or if she should be barren or become a conless widow or be otherwise disqualified then the whole or my properties shall pass into the hands of the Government. The whole of the profits of my estate which shall remain as surplus after the expenses connected with the various matters specified above have been defrayed shall be emplo, ed by Go emment as it thinks proper in the improvement of the school and the dispensary and in alleviating the sufferings of the blind the lame and the poor and th helpless of my native village and of the neighbouring villages.

In witness whereof etc.

### 3 Will (Another Form)

This is the will of me Umesh Chandra Lahiri son of Hari Charan Lahiri deceas d of Tushbhandar in the district of Rangpur I have no son or daughter at present my only near relatives are my mother Srimati Anandamoy:

Debt my wife Srimati Braja Kumarı and my si ter Bhagabatı

After my death all my properties shall be placed in the hand of my si ter's husband Baba Rasik Lal Maitra and my father in law's grand sons hali Pro.anna Maitra and Pratap Chandra Maitra as trustees. They shall P ) out of the income of my properties Rupees fifty per month to my wife and Pup- twenty five per month to my sister and shall defray the expenses for the performance of rites for the spiritual welfare of my mother they shall also pay to my precepter Snjukta Hari Nath Bhattacharya of Purba thali in the district of Burdwan Rs. 10 as barshik and to my purchit Stripukta Strish Chandra Chakravarty of Rangpur Rs. 5 as barshik and after defraying the expenses for the sleba and worship during my turn of the ancestral joint Deity Saligram Nara n they shall spend the surplus income which may be left, in the sheba and worship of Kalee after the name of my mother te in the name of Iswan

Anandamos i Kalce The image of the Deits shall be established and consecreted Anandamoji kalee The image of the Ucity stail be established and consecrete

the allowed for the fore the form has been been the forest for the form that the forest fores at m5 obcume house or at Austree and m case my use or sister ones then allowance which I have fixed for her during her life-time shall after her the morance which I have need for her burnsk ner mening to the worship of the said Anandamo). Asket If no speni for the worship of the said Ananoamost Asice

The spenial for the worship of the said Ananoamost Asice

The spenial for the spenia the income of my properties is not used for her sheba and worship then my end one of the house o

the income of my properties is not used for her sheed and korship then my not man Demonstrate and Han Nath Bhattacharya and his sons grand ons etc. shall be a supplemental the same of th preceptor the said Hart Nath Unattachar) a and his sons grand ons etc. snaw on a standard posec, it the same in absolute tight from generation ket tty rangera properties and passes the same in auso to generation with right to sell or make a gelt thereof

The testator of this will is Laht Mohan Pal son of Rainara n Pal of village The testator of this will is Lauf Alonan Pal son of Education Pal and of Education Arts district Howards. It is to the effect following.

\*\*Commons of the Commons of the State of the effect following.\*\*

\*\*The Commons of the Common of the Commons of the Common of t At marned wife Securate Howard It is to the effect following - Posts may wife and moved from the provided in amount of the control of the con an at present 36 years of age Both my sufe and myself are in enormed to the analysis of age Both my sufe and myself are in enormed to the age of the age o am at present 36 years of age. Both my wife and myself are in enjoyment of probable that I shall have no children at all. Electrology when and how I am to die. It is therefore bruden to all the therefore bruden to probable that I shall have no children at all Human frame is but frait and now I am to die It is therefore product to the will not die It is therefore product to there is no knowing when and how I am to die It is therefore prudent to the future noss. I therefore execute this will and desire that it there will be a not to the control of the contro Provide for the future non 1 therefore execute this will and desire that if there are the first than the most and the first will are all my property after the first than any wife will are all my property after the first than the most area. my death. If there be no children then my wife will enjoy and appropriate roots. In this case, of her stands of her stands and minor cable in full propretary. at her own will the entire property moveable and immoveable in full propretary

noted in the event of her death my next reversionary her will have such

to be both and the first property move and the both and the nght in the event of her death my next reversionary heir will have such the children moveable and immoveable property as will be lett behind by her II my with a substantial and share are death the arrangements but if I do not dies chiidless during my lie time I shall make other airzangements but II I do not carnot do so there after my death the entire property will revert to the said has an analysis and has anal or cannot do so then after my death the entire property will revert to the said be operative as Fourth all movement of the said being than the said being that the said being that the said being that the said being the said being the said that the said being the said that the said t hen This will shall be enforced and be operative as regards all moveable and rent free and rent free such as pucca buildings that the flower and rent free gold models for the such as pucca buildings that the flower and move able and sulver utensia wood outton class and other abouts all source of the flower and the flowe gold module gold and sliver utensis wood cotton glass and other articles and other articles and other articles and other articles are accounts because and in whatever manner ettsting which I might cam one from moneyer con

the which I might earn of acquire necessary

I have a minitess named Assumding therefore

Loan than than the mandance of the stars and

Don't have a star with the allowed the this has been obted on to me For her residence she will be allotted the common to the from my bound for the common to the form of the form my bound for commonts as who has been obed ent to me For her residence she will be allotted the wall as the brace trends for her from my house. Her organization as the brace trends for her tise as also the furniture bod ent. soul he Ducca house Situated in my carden not far from my house sell as the brass utensia first for her use as also the furniture bed etc. will be a hormoned and another form of her brass and so her furniture bed etc. will be Hell as the brass utensis fit for her use as also the furniture bed etc. will be despited and shoped by her. If after my death, she becomes unfaithful and shopes and to despite and the despited of those arriving and to desire and the desired of the state of the sta Retained and enjoyed by her II alter my death she becomes unfaithful and from 35a moretan house. She will be depirted of those articles and be driven out from the garden house

This will is written by the Banku Behan Saha of etc. Being without the state of the This will is written by me Hankii Hehari Saba of etc Being without in allowing the adoption of a state of the saddy that is anthonously in adapting permission to adopt fine and a state of the saddy that the saddy tha any male issue I fixe my wife Sevenatee Kadumbuu permasaon to adopt fixe her will If my Kife is authorised to adopt one to five sons according authors and any succession and succession are succession and succession are succession and succession are succession and succession are successive and succession are successionally and succession are successive and succession are successive and succession are successive and succession are succession. sons in succession. My wile is authorised to adopt one to five sons according to the name of the antire production in some of the sold adopt one to five sons according to the name of the to her will. If my vide should adopt a son such son and my wife shall succeed
the ownership of the entire properties in equal shares vested with the power.

bia w c

of sale and gift and no violation of such provision shall be permitted. In the event of disagreement between my adopted son and my wife my estate shall be divided equally among my adopted son and my wife. If the aforesaid adopted son or my said wife should find it necessary to sell any of the properties left by me they shall be entitled to sell it to a stranger if my heirs and co sharers refuse to purchase it for an adequate consideration. If no son I taken in adoption by my wife she shall succeed to all the propertie, left by me and shall be malik with powers of sale and gift. After my death my said wife shall take probate of this will. Dated etc.

# 6 Will (Another Form)

This is the last will and Testament of me A B son of C D of Rangunj in the district of Burdwan Being in a bad state of health and being desirous of making provisions as regards my properties after my death I do hereby devise and bequeath as follows—

1 I appoint my sons C and D to be the executors and trustees of my Will and I declare that all trusts and powers hereinafter reposed and vested in my executors and trustees shall or may be exercised by the Juristors or survivor of them

2 I direct my executors and trustees to pay in the first place out of my estate all my just debts and testamentary expenses and also to spend the sum

of Rs 500 for my funeral and staddha expenses

3 I give to my dear wife Srimati Nahini Desi Government Promissory Notes of three and a half per cent loan of the nominal value of Rs 8000 abso lutely to be paid and made over to her within six calendar months after my death and I also bequeath to my said wife Srimati Nahini Debi my family dwelling house No 5 M N Street in the town of Calcitata for her life only I also bequeath to her absolutely all the jewellery gold and silver ornaments which she has been using

4 I do hereby give devise and bequeath my business carried on under the name and style of A B & Co (of which I am now the sole propietor) to C D and F being my first \_cond and third sons respectively in equal shares. To the said three sons I also give and bequeath all my ancestral and self acquired properties situated in the distincts of Burdwan and Nadia and also the Government Promissory. Note of 4 per cent loan of the nominal value or Rs 12 000 and also all my household effects, furniture and all properties thowards in timmoveable which I hold or stand possessed of

5 I give devise and bequeath to each my two daughters Srimati Bimala Debi and Pramila Debi rupees five thousand in cash to be paid unto the said daughter.

daughters within two calendar months after my death.

of I direct my executors to pay to my said wife Srimati \alini Debi during the term of her natural life the sum of Rs. 30 per month for her personal expenses in addition to the other benefits provided for by this my will

In witness whereof etc.

## 7 Codicil

This is a codicil of me Euran Chandra Das, of 25 CoPere Street in the town of Calcutta to my last Will and Tes arient bearing date the 15th 6.v of August 1924 and which I direct be taken as part thereof

I give and bequeath the sum of Rupees 10 000 to each son and daighter of my daughter Hiranmoyi living at the time of my death and I direct that the legacy hereby given to each such son or daughter who shall have attained the age of 21 years shall be pind to him or her as the case may be as soon as conveniently may be after my death and that the legacy hereby given to each and every such on or daughter who hall not have attained the age of 21 years shall be invested in Government Securities in the names or name of my Trustees or Trustee who shall make over the ame to him or her upon his or her attaining the a e of 21 years and in the meantime receive and accumulate the interest of the said legacy or Government Securities

If any such grand son or grand daughter shall be unmarried at the time of my death I give and bequeath the sum of Rupees 5000 to each and sery such unmarried son and daughter (which shall be payable to the guardian of such on or daughter if any guardian there be) for the autroos of paying for

his or her marriage expenses

I d rect that out of the accumulated interest on the legacies aforesaid shall be de'rayed the expenses for education of those children to be paid to the guardians of those children for such purpose and that in ca e of any of the aid legatees dying after my death but before attaining the age at which payment is to be made to them under the provisions herein contained his her or their legacy shall be payable to his or her or their personal persentatives

In witness whereof etc

# Application for Probate

In the Court of the District Judge of 24 Perganas

Probate case No 2 of 1926 under Act YXXIX of 1925

The humble petition of A B son of C D by cate by occupation resident of most respectively sheweth —

Trainent of a most respectively sneverified. The statement of of who died at on the day of 19 within the jurnsdiction of this Court leaving at the time of his death the properties specifically described in the anneved affidavit and that the said will was duly executed by the aid deceased

2 That the petitioner is the son of the testator and is the executor named

in the said will

3 That the amount of assets which are likely to come to your petitioners hand is Rs an account of which is given in schedule A and the amount of h s liabilities is Rs which is described in schedule B of the annexed affid

4 That to the best of your petitioners belief no application has as yet been made by anybod, to any other Court for a probate of the and will or for letters of administration of the said properties

5 Under the circums ances your petitioner prays that the Court may be pleased to grant probate of the annexed will to your petitioner

And your petitioner as in duty bound half ever pray

I the pertitioner above-named do hereby declare that what is stated in the above petition is true to the best of my information and belief

\*I one of the witnesses to the last will and testament of the testator mentioned in the above petition declare that I was present and saw the said testator affix his signature thereto.

[Signature of uniness to the will]

Schedule—A Schedule—B

#### 9 Application for Letters of Administration

In the Court of the District Judge of Murshidabad Case No under Act XXXIX of 1925

In the matter of an application for Letters of Administration of the estate of the late

The humble petition of of most respectfully sheweth -

1 That the late A B of died at on the day of leaving properties situate within the jurisdiction of this Court A des-

- emption of the said properties is set forth in the affidavit annexed to the petition 2. That a description of the relative of the deceased and their respective residences are given below.
  - (1) Son (Petitioner)
    - (2) Brother resident of
    - (3) Widow Sreemati resident of
  - (4) Mother Sreemata resident of (5) Daughter Sreemata resident of
- 3 The petitioner is the son of the deceased and as such is entitled to letters of administration to the estate of the deceased

4 [As in Para 3 of Application for Probate above]

- 5 That to the best of your petitioners belief no application has as yet been made by any body to any other Court for letters of administration of the estate of the said deceased
- 6 Under the circumstances set forth above your petitioner prays that letters of administration to the estate of A B may be granted to your petitioner And your petitioner as in duty bound shall every pray

I the petitioner in the above petition do hereby declare that what is stated therein is true to the best of my information and belief

[Signature of Petitioner]

# 10 Application for Succession Certificate

In the Court of the District Judge of Hooghly

Case No 4 of 1926 under Part \( \lambda \) Act \( \lambda \lambda \lambda \) N of 1925

The humble petition of A B son of C D caste by occupation resident of most respectively sheweth —

I That the deceased above-named died at on the day

2 That the ordinary residence of the deceased at the time of his death was at which is situate within the jurisdiction of this Court and that the deceased left properties mentioned in schedule A within the local limits of the jurisdiction of this Court.

3 That the deceased left him surviving the following relatives -

1 Mother of 2 Daughter of

2 Daughter of 3 Widow of 4 Brother of

5 Son (Petitioner)

4 That your petitioner being the only son of the deceased claims to be entitled to a certificate under the provisions of this Act

5 That there is no impediment under section 370 of the said act to the grant of the certificate or to the validity thereof if it were granted to the petitioner. The deceased did not make any will and no application has been made to any other Court for probate of any will or for letters of administration.

to the estate of the deceased

6 The particulars of the debts and the securities in respect of which

certificate is prayed for are set forth in the schedule B annexed hereunto
7 That your petitioner has deposited in this Court the proper fee payable

in respect of such certificate
Your petitioner prays for an order that a certificate be issued to him
under the provisions of the Act referred to authorizing him to realize the debts

mentioned in the foregoing petition

And your petitioner as in duty bound shall ever pray

I A B the petitioner above named do hereby declare that the statement contained in paras. 1 to 7 of the above petition are true to my knowledge and belief

[Signature of the applicant]

Schedule A—The properties of the deceased within the jurisdiction of the Court

Schedule B-Debts due to the estate of the deceased in respect of which certificate is prayed for

## Application for extended Certificate

In the Court of the District Judge of Midnapore

In the matter of Petition under sec 376 of Act XXXIX of 1925 of A B son of C D resident of etc

The petition of the above named petitioner most respectifully sheweth -

1 That by an order of this Court dated the certificate under Part X of Act XXXIX of 1925 was granted to your petitioner

nder Part A of Act AAA1 tor 1923 was granted to your personner

2 That the said certificate does not include the debts and securities specified in the schedule annexed hereto

3 That to the best of your petitioners belief no application has been made to any Court and no grant has been made of any succession certificate or probate or letters of administration in respect of the said debts and securities and there is no impediment under sec 370 of the aforesaid Act or under any other provision of the aforesaid Act to the extension of the certificate hereby prayed for

4 Your petitioner therefore prays that the said certificate dated may be extended to the debts and securities specified in the schedule annexed hereto.

And your petitioner as in duty bound shall ever pray

[Signature]

# 12 Security bond

In the Court of Case No of

Know all men by these presents that I principal am held and firmly bound to Fsqr the District Judge of to be paid to the said in the sum of Rs Esqr District Judge or to his successor in office and we (Sureties) are jointly and severally held and firmly bound to the said District Judge in the sum of Rs to be paid to the said District Judge or to his successors in office for the payment of which we the above principal and sureties bind ourselves our heirs executors administrators and representatives firmly by these presents Signed by ourselves and sealed with our respective seals this day of

Whereas by an order of the Court of the District Judge of made on the day of s under (Section) the above named principal has subject to his entering into a bond in Rs with one or two surety or sureties in the sum of Rs been granted probate (or letters of administration or succession certificate) in the goods of

And whereas the said (principal) has agreed to enter into the above written bond and the said (sureties) have agreed to enter into the above written bond as sureties for the said (principal) do and shall justly and truly render account for what he may receive in respect of the property for which the probate (or letters of administration or succession certificate) is granted and shall indemnify the person who may be entitled to the whole of such property or any part thereof in future and in all things conduct himself properly then the above written bond or obligation be void and of no effect otherwise the same shall remain in full force and virtue

Dated Principal
Witnesses Sureties

# 13 Application for revocation of probate or letters of administration

In the Court of the District Judge of 24 Parganas
In the matter of application under sec 263 of Act XXXIX of 1925
The petition of A B and C D of most respectfully sheweth —

1 That in Case No of 1925 one M N obtained probate of the last will and testament of P Q deceased (or obtained letters of administration in the goods of P Q deceased) from your Court on the day of 1995

That the said grant of probate was obtained fraudulently, inasmuch as the will in respect of which the probate was granted to the said M N was a forgery and that the said P Q deceased had left no will at the time of his death or

[2] That the said grant of letters of administration was obtained fraudulently inasmuch as the said M N concealed from the Court the fact that the said P Q deceased had left a will whereby the deceased had appointed your petitioner as executor [

3 That the proceedings to obtain the probate (or letters of administration)

were defective in substance masuruch as no citation was issued on the putitioner and other relatives of the deceased

4 Your petitioner therefore prays that under the above circumstances the grant of probate (or letters of administration) may be revoked

And your petitioner as in duty bound shall ever pray

# 14 Application for revocation of succession certificate

In the Court of the District Judge of Bankura

Application under sec 383 of Act XXXIV of 1925
The humble petition of A B son of C D resident of etc most respectfully

- sheweth —

  1 That in Case No of 1925 one M N obtained a succession certificate to collect the debts due to the deceased P Q on the 23rd November 1925
- 2 That under the Hindu law your petitioner is a preferential heir of the deceased P Q to the said M N and is the proper person entitled to succession certificate
- 3 That at the time of making the application for succession certificate the said M N fraudulently concealed the name of your netitioner and no citation was issued on him
- 4 Under these circumstances your petitioner prays that the said certificate granted to M N be revoked

And your petitioner as in duty bound shall ever pray

Signature 1

### GENERAL INDEX

```
NB-The figures indicate the numbers of Notes and not the numbers of page
Abatement of annuity 189
   -of general legacies 377
   no-of specific legacies when assets are sufficient to pay debts 379
   rateable-of specific legacies sec 330
    what legacies are treated as general for purpose of— sec 331
Acceleration principles of- 152
Account duty of executor or administrator to file- 370
    one-only is to be filed 370
    Court has no power to demand yearly or revised- 370,
    extension of time for filing- 370
    what Court can demand- 370
Accumulation of income direction for-is not invalid under Hindu Law 133
    direction for-in a vested interest 138
Acknowledgment of liability by administrator whether valid 246
    -of time barred debts by executor or administrator 221 246
Acknowledgment of signature by testator 58
Act this-is a consolidating statute and not an amending one 1
    -scope of (Preamble p 2);
    -Succession and Probate and Administration Act (Preamble p 2)
    -if retrospective in operation (Preamble p 2)
    -applicability of-to Foreigners (Preamble p 2)
    -not applicable to Crown 1
    construction of- 1
    persons exempted from the operation of this- 8
Ademption meaning of (Sec 152)
    -of specific legacy 174
    no-of demonstrative legacy 173
    -of bequest of goods by removal 176
    no-by reason of change of property by operation of law 178;
    no-by change of property without testator's knowledge 179
    no-of bequest by subsequent provision for legatee 193
Administration Bond 332
    -whether necessary from executor 332
    form of- 332
    liability under-3 332
    amount of- 332
    liability of sureties under- 332A
    what amounts to breach of- 333
    assignment of- 334
    no appeal lies from order of assignment of- 334 346
Administrator defined (Sec. 2)
    who can be appointed- 241
    who cannot be appointed-, 261
    become, functus officio when administration complete (Sec. 216)
    removal of- 349
    power of High Court to give directions to-, 350
```

effect of- 384

-may be express or implied 384 conditional-, 385

-of executor is necessary to his own legacy 386,

```
power of several administrators may be exercised by one 366;
    survival of powers on death of one of several administrators 367;
    power of-de bons non 368
    power of-durante minoritate 267 sec 314:
    power of-bendente life 271:
    -ad letom 274
Administrator General when property of deceased vests in-, 221,
    verification of application for letters of administration by- sec 281:
    administration bond may be assigned to- 334
Admissibility of evidence 83
Adopted child right to inherit 9A
Alteration effect of-made in a will (sec 71)
    -made after execution of will 78
    grant of probate of will excluding the 78
    -should be executed in the same manner as a will 78
Alternature bequest in the- 107
Ambiguity admissibility of extrinsic evidence in case of-in a will 88
    where such evidence is not admissible 88
Annuity bequest of- (sec 173):
    -whether perpetual or for life only 187
    bequest of money to be invested for purchase of- 188
    -must be satisfied before residuary legacy 190
    when-of second year or successive years is to be paid sec 340
    procedure when no fund is charged with or appropriated to- sec 343;
    any other person who are included in 3
Appeal no-from order passed in a proceeding for protection of property of deceased
      218
    -from order accepting security from executor or administrator 332 346
    no-from order of assignment of administration bond 334 346
    -from order of Sub Judge in a probate proceeding lies to High Court and not to
      District Judge 345
    -from order granting or refusing to grant probate etc 345
    -from order revoking probate 345
    -from order granting permission to sell 345;
    where-does not he 346
    -to Privy Council 347
    effect of grant of probate or letters being set aside on- 343
   -against order granting refusing or revoking succession certificate 425
    -from order of Sub Judge granting succession certificate lies to the District
      Judge 426
    no second-lies to High Court 426
Apportionment of annuities sec 340
Arbitration proceedings for grant of probate cannot be referred to- 311
Assent legacy does not vest in legatee without his- 114
    -of executor is necessary to a legacy 382
    -of administrator with will annexed 381
    object of- 382
    effect of executor not grung-to a legacy 382
```

```
-gives effect to the legacy from the time of testator's death 387
Assets petition for probate or letters must state the amount of- 321 323
Assignee from heir of deceased is bound to take succession certificate, 236.
   succession certificate can be granted to such- 236 410
   -from certificate holder need not take fresh certificate 236
   -from deceased decree holder need not take certificate 239
Attestation of will 57
    what amounts to- 57
   -of will of a gentleman by his servants and dependants does not make the will
      invalid 57
    -need not take place immediately after execution of will 57.
    -need not take place at the place of execution of will 57,
    -by Sub Registrar 59
    no form of-is necessary 62
Attesting ustnesses signature of- 60
    -must sign and cannot put his mark 60
    -- must see the testator sign the will 57 or must receive from the testator a per
      sonal acknowledgment of his signature, 58
    person signing on behalf of testator cannot be an attesting witness 57
    servants and dependants of testator may be valid- 57
    -may sign in any part of the will 60
    -must sign in the presence of testator 61
    all attesting witnesses need not be present at the same time 61:
    effect of gift to- (sec 67)
Attorney letter of administration to-of absent person 265
Beneficiaries sole-if residuary legatees, though not named as such 259
Bequest without words of limitation (sec. 95)
    -for life 103
    -to females 104
    -in alternative (sec 96)
    -to class of persons 109 119 141
    where two bequests to same persons (ec 101)
    -by particular description (sec 112)
    -which is inoperative in part (sec 115)
    -to religious or chantable uses (sec 118)
    -upon illegal or immoral condition (sec. 127)
    ---where fails (sec 129)
    -conditional 154
    original-not affected by invalidity of second (sec 132)
    -with directions 162
    -of fund (sec 140)
Blind person execution of a will by- 40
 Brahmo is included in the term Hindu 26
 Buddhist 26
    -does not include a Chinese Buddhist 26
Burden of proof as regards testamentary capacity of testator 38
    -when will is challenged on ground of undue influence 50
Cause of action what-survives to and against executor and administrator 3.5
     what-does not survive 357
Cateat against grant of probate or administration 330
     persons who are entitled to enter- 328
```

per on can oppose grant without entering- 330

```
caveator must possess sufficient interest to support a- 330
Charitable bequests are not void for uncertainty 97:
    rule against perpetuity applies to- 126:
    rule as regards- (sec 118)
Child does not include illeritimate child 304
Chinese Buddhist is not strictly speaking a Buddhist 26
C P Code procedure of-is to be followed in proceedings for grant of probate or letters
      of administration 310
    what provisions of the-do not apply to such proceedings 310
Christian a Hindu becoming-ceases to be Hindu 26
    Hindu becoming-is governed by this Act 26 29
    -renouncing Christianity and adopting Hindu religion becomes a Hindu 26
    rules for succession to the property of a- (sees 32-49)
Citation to executor to accept or renounce his executorship 251
    -before administration is granted to a legatee 260
    absence of-is a ground of revocation of probate etc. 296
    procedure for-on minor 296 327
    issue of-in proceedings for grant of probate or letters of administration 327;
    on whom-us to be assued 328
    publication of- 329
Class beguest to a- 109
    meaning of- 109
    no lapse of legacy in case of bequest to a- 119
    survivorship in case of bequest to a- (sec 111)
    bequest will go to such members of the-as survive the testator 122
    bequest which fails as regards some members of a-whether fails as regards the
      whole class 129
    what members of a-do not acquire a vested interest 141
Codicil defined 2:
    -is part of will 2
    probate may be granted of- 2
    effect of- 2
    revocation of will does not amount to revocation of- 68,
    will must be construed with reference to- 90
    separate probate of-discovered after grant of probate (sec 225)
    procedure where-is discovered after grant of administration with will annexed 228
Coercion will obtained by- 47
Commission or agency charged by executor or administrator sec 309
Common form proof of will in- 327
Compromise whether probate can be granted in terms of- 312
Condition bequest upon impossible-is void 149 (sec 126);
    bequest upon illegal or immoral-is void 150
    -precedent and-subsequent 147
    -precedent may be substantially complied with 151
    -subsequent must be strictly fulfilled 156
    instances of-subsequent 154
    -as to residence 158
    non specification of time for performance of-subsequent 159
```

performance of-precedent or subsequent within specified time 160

Conditional bequests (Ch. xi)
Confucian this Act applies to— 36A.
Consanguinity meaning of 24

lineal- (sec 25).

١

```
collateral- (sec 26)
Construction of this Act 1
   -of words in a will 81
   -of technical words 81
   -of plain non technical words 81 82
   -of words with reference to the intention of the testator 82
   admissibility of extrinsic evidence for-of will 83.
   -must be on the whole will 90
    -of words in a restricted sense 91
   no part of a will is to be rejected if it can be rea onably construed 93
    which of two possible-should be preferred 92
    -of words repeated in different parts of will 94
    -in case of two bequests to same person (sec 101)
   -as to whether interest is vested or contingent 137
   -as to whether a condition is precedent or subsequent 148 155
Contention meaning of 338
   when proceeding becomes contentious 338
    District Delegate cannot grant probate or letters if there is- (sec 286)
Contingent bequest (secs 124 125)
Contingent interest vested interest and-distinguished 135
    instances of- 139
    time of vesting of- (sec 120)
Copy letters of administration with authenticated-of will proved abroad 252 253
    probate of-where original will exists (sec 239)
Correction of clerical errors in a will 86
Court of Wards when may be appointed curator (sec 207)
    when letters of administration may be granted to the manager of- 269
    legacy to minor who is a ward of- sec 348
Creditor legacy to-does not amount to satisfaction of his debt 191
    grant of letters of administration to- 241
    all-of deceased shall be paid rateably 374
Criminal prosecutions whether survive to the executor or administrator 358
Crown this Act does not apply where the property vests in the-for failure of heir
      1 237
Curator appointment of-for protection of property of deceased 216
    powers conferred on such- (sec 196)
    power of-shall cease on grant of probate etc (sec 197)
    -shall give security and may receive remuneration (sec 198)
    institution and defence of suits by- (sec 200).
    accounts to be filed by- (sec. 202)
    appointment of public- (sec 210)
    suit by 216A
    -is not bound to take succession certificate 236
Custom does not override the provisions of this Act 26
Deaf and Dumb person execution of will by-- 40
Debt meaning of-for the purpose of a succession certificate 232
    suit for recovery of residuary legacy is not a suit for debt 232
    unliquidated amount is not- 232
    suit for redemption is not a suit to recover a debt 232
    what is and what is not a- 232 238
    suit for foreclosure is not a suit to recover debt (sec 214) 233
    S-61
```

```
whether succession certificate can be granted to collect a portion of- 234,
    duty of executor or administrator to collect-due to deceased 372
    all debts due from the deceased are to be paid rateably 374
    -must be paid before legacies 375
Death actions for injuries causing-survive to the executor 357
Demonstrative legacy defined (sec 150)
    distinction between specific and- (sec 150 Expl.)
    payment of- 172.
    no ademption of-, 173:
    interest on- 397
    right under- when assets are sufficient to pay debts 380
Description of specific property 99
Decastation liability of executor or administrator for- 406
    what acts amount to- 406 407:
    -by one of several executors or administrators 406
Directions power of High Court to give-to administrator 350
Discharge given by one of several executors 366
Distribution period of 145
District Delegate power of-to grant probate etc in non contentious cases 307
    -cannot grant probate or administration where there is contention (sec. 286)
District Judge defined 2.
    -includes a High Court 2 409
    Jurisdiction of-to grant and revoke probate etc. 305
    powers of Additional-to revoke a grant 306;
    -can transfer a probate case to a Sub Judge 307
    turisdiction of-to grant succession certificate 409
    -cannot delegate the inquiry to a Sub Judge 412
    investiture of inferior Courts with powers of- 429
    in which cases appeal shall lie to the- 426 429
Dismissal of application for default does not debar a second application 310
Domicile succession to moveable property is governed by the law of the country of-
      of deceased 10 22 23
    onus of proof as regards- 11
    a person can have only one- 12
    of corporation 10
    -of origin 13
    such-continues until abandoned 14
    -of choice, 15
    acquisition of-of choice 15
    conditions of change of- 15A
    residence in another country for performing public duty is not change of- 15A (see
       Explanation ),
    abandonment of-of choice 16
    resumption of 16A
    -of minor 17
    -of married woman 18 19
    migration does not change character of estate 18A
    acquisition of new-by minor or lunatic 20 21
Donatio mortis causa 208
```

Drunkenness execution of will during— 42
Duty if payable on entire amount 411A
Election doctrine of— 194

```
application of the doctrine of- 195
   -takes place where testator bequeaths property not his own 196
   different nature of the properties not a bar to- 197
   revocation of- 198.
   person deriving benefit indirectly is not put to- 201
   no-by person taking in different capacities 202
   acceptance of benefit under will amounts to- 204
   two years enjoyment of benefit amounts to- 205
   time for- 206
   -by guardian on behalf of minor 207
Error in a will in name or description of legatee 84
   -in case of legacy to a person in a particular character 85
   vords may be supplied to correct error or omission 85A 86
   correction of clerical-in a will 86.
   rejection of erroneous particulars in description of subject 86
   -in probate or letters may be rectified by Court 287
Evidence as regards testamentary capacity of testator 38
   -as regards execution of will under fraud coercion or undue influence 50
   -admissibility of 83
   --extrinsic 88
Frecution of decree succession certificate necessary before- 239
Execution of will (sec 63)
    execution of privileged wills (sec 66)
    petition of probate must state the fact of due- 320
   -must be proved in proceedings for probate 326
Executor defined (sec 2)
    bequest to an- (sec 141)
    -cannot take bequest unless he acts as executor 167
   property of the deceased vests in the- 221,
    property which passes by survivorship does not vest in- 223;
   -cannot enforce his right in Court without taking probate 226
    appointment of-may be express or implied 248
    -according to tenor 248
    refusal by-to accept office (Sec. 223);
    grant of probate to several executors 249
    executor s-or administrator is not a derivative- 257 282
    -for special purpose 271
    power of several executors may be exercised by one 366
    survival of powers on death of one of several executors 250 367
    if need submit account only for one year 370A
Executor de son tort 352
    instance where a person becomes- 353
    hability of- 354
    who can sue an- 354
Expenses funeral-must be paid before all debts (sec 320)
    what-are to be paid after funeral expenses and before debts (sec .21);
    -for obtaining probate or letters of administration 373
    when testamentary-are to be paid out of the estate 373
Extrinsic evidence admissibility of-in construction of will 83
    -admissible in case of ambiguity 88
```

where—is not admissible 88 Fraud will obtained by—, 46

```
performance of condition precedent or subsequent prevented by- 161,
    revocation of probate or letters obtained by- 297
Females bequest to-whether confers absolute interest or life interest, 104;
    restraint on alienation in case of bequest to- 162
Foreign will-grant of probate or letters of administration 252
Forgery revocation of probate on ground of-of will 298
Fully administered—question if relevant 259A
General legacy and specific legacy distinguished 169
    when specific legacy does not abate with- (sec 149)
Gift over is invalid if absolute estate is given to the legatee 106
    no condition can be attached to a- 154
Guardian appointment of-by will (sec 60)
    -may execute bond on behalf of minor 410
High Court is included in the definition of District Judge 2
    power of-to grant succession certificate 2 409
    jurisdiction of-to grant probate etc. (sec. 300)
    power of-to remove executor or administrator 349
    power of-to give directions to executor or administrator 350
Hindu becoming a Christian ceases to be- 26
    meaning of the word- 26 36
    Brahmo is a- 26
    Kalai is not- 26
    Christian renouncing Christian religion and adopting Hindu religion is a- 26
    -can succeed to the property of a Christian 26 29
    Cutchi Memon is not a- 36
Holograph will 7
Illegitimate children relationship does not include- 25 29 30A 134
    when-will be included in bequest 110
Illness execution of will during-43
Impartible estate successor to-whether bound to produce succession certificate 237
Inconsistent clauses in a will should be reconciled as far as possible 96
    the last of two-shall prevail (sec 88)
Indian Christian defined (sec 2)
Inheritance of Hindu women see Sec 59 Notes
Insunction power of Court to grant- 271
Inquiry in a proceeding for protection of property of deceased 213
    order passed without-is subject to revision by High Court 214
    -in proceeding for succession certificate 412
    -must be summary 412
Insanity execution of will during- 41
    revocation of grant on ground of-of executor or administrator 299
Intention of testator must be looked to in construction of will 82
    -must be deduced from the words of will 82
    Court cannot speculate upon the- 82
    any absurd-must not be presumed 82
    -must be eathered from the whole will 90
    -must be given effect to as far as possible 95
    -as to whether an interest is vested or contingent 137:
    -as to whether the devise is absolute or for life only 162
    -as to whether annuity is perpetual or for life 187
```

Interest bequest of—of fund amounts to bequest of principal 185

```
-on general legacy when no time is fixed for payment 396
   -on demonstrative legacy 397
   -on general legacy when time is fixed for payment, 398
   rate of- (sec 353).
   no-on arrears of annuity within first year (sec 354)
Interlocutory orders whether appeal hes from 346
Intestate meaning of __ 27
Intestate and testamentary succession (Preamble p 2)
Inventory 369
   duty of executor or administrator to file- 370,
   in what cases-shall include property in all parts of British India (sec. 318)
    revocation of grant for omission to file- 300
Investment of funds to provide for legacies (secs 341 342)
Jews are governed by this Act 26
Joint administrators should not be appointed 243 244
foint tenancy is not presumed in case of legacy to two persons 117,
    English rule of-is not favoured in India 117
    cases in which-occurs 118
    -in case of bequest to a class 119
Joint will 7
Jurisdiction local-of District Judge to revoke grants 290
    local-of District Judge to grant probate or letters 315
    local-of District Delegate to grant probate etc. (sec. 272)
    local-of District Judge to grant succession certificate 409
Just cause revocation of grant for- (sec. 263)
    what is a- 294.
    what is not a- 301
Aindred meaning of 24 124
    definition of-in this Act is different from the meaning of the word under Hindu
      Law 24
    mode of computing degrees of- (.ec 28)
Lapse of legacies 115;
    where legacies do not- (sec 106)
    no-in case of bequest to a class 119
    when lap ed share goes as undisposed of 120
    when bequest to child does not-by his death during testator's life 121
Legacy all debts of the deceased must be paid before- 375
    executor is not bound to pay-without indemnity 376
    executor is not bound to pay-before one year 388
Letters of administration Hindus are not bound to take out- 225
     to whom-may be granted 241;
    -limited to certain property cannot ordinarily be granted 213 28/1;
     what intermediate acts are not validated by- 246
    -with authenticated copy of will proved abroad (sec. 228)
     -with a copy of will annexed (secs. 231 231);
     to whom-cannot be granted (sec 236)
     grant of-until will is produced 264;
     grant of-durante minore aetale 267 269
     grant of-de bonis non 257 282
     grant of-perdente lite 271;
     -limited to a special purpose (sec. 249):
     -Imited to part cular property 273,
```

```
-ad litem 274
    -ad callisenda hona 276.
    grant of-to person other than person ordinarily entitled 277
    grant of-subject to certain exceptions 280
    grant of-caeterorum 281
    conclusiveness of-as to the representative title of administrator 318
    time for grant of- 335
    power of Court to refuse to grant - 344
Life insurance policy payable to executors 225A,
    -if succession certificate for money due on (Sec 214)
Limitation bequest without words of- 102
    what are words of- 105
    s hat are not words of ____ 106
    -of time for application for protection of property of deceased 217
    no-for application for revocation of grant 304
    no-for application for grant of probate or letters 313.
    no-for application for succession certificate 411
Lineal descendant meaning of 121
Locus stands of objector to contest proceeding 326C
Lost will whether raises a presumption of revocation 76
    probate of copy or draft of- 262
    probate of contents of-or destroyed will 263
Malicious prosecution cause of action for-whether survives to the executor 356
Mark affixing of-by illiterate testator 54
    effect of affixing of-by testator who can ign 54
    -must be affixed by testator himself 55
    -of testator cannot be affixed by any other person on his behalf 55
    attesting witnesses must sign and cannot affix their- 60
Marriage interests and powers are not acquired by- (sec 20)
    effect of-between person domiciled and one not domiciled in British India (sec 21)
    settlement of minor's property in contemplation of- (sec 22)
    revocation of will of Christian by- 66
    no revocation of will of Hindus etc by- 70
Minor defined 3
    -cannot make a will 39
    probate or letters of administration cannot be granted to- (secs. 223-261)
    procedure for citation on- 296 327
    legacy payable to-should be paid into Court (sec 348)
    procedure if-is under the Court of Wards (sec 348);
    grant of succession certificate to a- 410
Mustake in name or description of the legatee may be corrected 84
    -how far material when legacy is given to a person in a particular character 85
Mortgage succession certificate is not necessary to recover debt due on- 233
Moreable property success on to-of a person of foreign dom cile is governed by the
      law of the country of the domicile 10 22 23
Notice must be given to all persons interested before revocation of probate 302
    -must be given to sureties and administrator before assignment of administration
      bond 334
```

Operous bequest person taking beneficial beque t is also bound to take-142

Obliteration effect of—in a will 78
Old age execution of will by person in— 43
Omissions in a will may be supplied by the Court 85A

```
Oral will 52
Partnership heir of dead partner need not take succession certificate 237
Pars: rules for succession to property of- (secs 50-56)
Partition restraint on 162
Period of distribution wift whether takes effect in case of persons born after testator's
      death but before the- 123
    person born after-cannot take 123
    what is the-in case of a contingent bequest 145
Perpetuity rule against- 126
    object of the rule 126
    Indian and English law compared 127
    instances of 128
Permission of Court to executor or administrator to sell property 362
    what Court can grant-, 362,
    executor or administrator is bound by the terms of-, 362
    sale or mortgage without-is to dable 363
Persona designata legacy to a person as a- 85
    legacy to a-does not fail by mistake in description or relationship 85
Personal snjuries cause of action for-does not survive the decea ed 356
Power of appointment executed by general bequest 100
    bequest for life with- 103
Preamble reference to D 1
Prior bequest gift to unborn person subject to a- 125
    bequest intended to take effect on failure of a void-is also void 131
    -is not invalidated by the invalidity of ulterior bequest 157
Priority no-among creditors of deceased 374
    -of one legatee to another 378
Privileged wills (sec. 65)
    rules for execution of- (sec 66)
    revocation of- (sec. 72)
Privy Council appeal to-from order under this Act 347
Probability how far a matter for consideration 326B
Probate defined 4
     whether the deceased a property vests in executor before taking- 222
    executor can deal with the property before taking- 222
    executor or legatee cannot enforce his right in Court without taking- 226
    use of will of which no-has been obtained 227
    effect of absence of- 227
    what the executor can do without taking out- 228
    -15 not necessary for a Mahomedan will 230
     after grant of- no person other than probate holder can sue 240
     -shall be granted only to executor 247
     effect of- 251
     -validates all intermediate acts of executor 251
     Court if can construe will to see whether applicant entitled to letters 256A
     persons to whom-cannot be granted (sec 223)
     -can be granted of a portion of a will 45 263 279
     -limited to special purpose 272
     grant of-subject to exception 279
     grant of-caterorum 281 300B
     conclusiveness of-as to the validity of will and title of executor 318
     -if may be granted on mere consent 326A
```

time for grant of- 335.

Court cannot refuse to grant-to executor 344

Procedure in a proceeding for protection of property of deceased (sec 194)

-of C P Code to be followed in proceeding for grant of probate etc 310 339,

-in contentious cases 339.

-in proceeding for succession certificate 412

Produce bequest of-of property amounts to bequest of property itself 185

specific legatee is entitled to-of legacy from the testator's death sec 349

-of residuary legacy etc 350

Prant of execution of will 326

-of will in common form and solemn form 327

See also Evidence Burden of Proof

Property will shall take effect in re pect of-remaining at testator's death 99

additions to-made between date of will and date of death 99 Proved and disproved-interpretation 258

Provident fund if debt or security 421

Province defined 5

Protection of property of deceased (sec 192)

application for— 209 nature of application 212

inquiry by District Judge upon receipt of application 213

revision of orders passed for— 214

Purchaser inquiry by—purchasing property from executor 360

position of - 360 position of fraudulent - 360

Purchase by executor or administrator of the property of deceased 365

-by executor from a legatee 365

Rateable distribution 374A

Receiver is not bound to take succession certificate 236

High Court may appoint—in proceedings for probate or letters 314

District Judge cannot appoint—in proceedings for succession certificate 412

Redemption heir of mortgagor sung for—need taking out succession certificate 232

233

suit for-is not a suit for recovery of a debt (sec 214) 232

Refund of legacy paid under Court's orders 399

no—if legacy paid under Court's orders 355

no—if legacy is paid voluntarily by executor 400

when each legatee can be compelled to-in proportion 401

creditor may call upon legatee to- 402

one legatee cannot compel another to- sec 362

Relationship denotes only legitimate relationship 25 (sec 100)

exception when-includes illegitimate relationship 110

Remotal of executor or administrator 349

Remuneration to curator (sec. 198)

Penunciation by executor 255

when executor cannot renounce 255 withdrawal of— 255

of letters of administration by administrator 255

withdrawal of-of letters 255

effect of- (sec. 231)

Res judicata Probate Court s decision is not- 340

Residuary legatee who is a- 111

to which property-is entitled 112

```
suit by-to recover his residuary legacy is not a suit for recovery of debt (sec 214)
        232
      grant of administration to a- 257:
      -is entitled to letters of administration and not to probate 257
      when representative of deceased-is entitled to administration 258
      transfer to-of contingent bequest (sec 344),
      residue after navment of debts and legacies shall be paid to- 405
 Residue undisposed of-falls into the general estate 113
 Restraint on alienation is void 162
      -on alienation in a bequest to females 162;
      -on partition 162
      -on mode of enjoyment 164
  Restrictions imposed by will on executor a power to dispose of property 361
      Court may remove such- 361
 Review of an order of grant of probate or letters of administration 289A.
 Revision of order passed on an application for protection of property of deceased 214
        219
Revival of revoked will 79
 Resocation of will by parol evidence 67
      will is always revocable 51,
      what is not 68
      no-by birth of a son 68
      no-by marriage 68 70
      no-by adoption of a son 68
      -of codicil 68
      no delegation of power of- 68,
      -of will does not amount to-of codicil 68
      -of part of a will 69
      -of will by another will or codicil 71
      dependent relative-, 72,
      -of will by some other writing 73
      -by burning tearing or otherwise destroying 74 75
      loss of will whether raises a presumption of- 76
      intention of-is essential 73 77.
      -of probate or letters of administration (sec. 263)
      revival of will after- 79
      -probate or letters of administration (sec 263)
      whether suit hes for- 289
      who can apply for- 291
      who cannot apply for- 292,
      effect of acquiescence and delay 293.
      what are just causes for- 294 300
      what are not just causes for- 301
      notice to be given to all persons interested before- 302
      fresh application for grant after- 303
      surrender of revoked probate or letters of administration 341
      payment to executor or administrator before-of probate or letters 342;
      sale under grants of probate or administration subsequently revoked 343
      -of succession certificate 424
      validation of payments made under certificate subsequently revoked (sec. 386)
      surrender of certificate after- (sec 389)
   Rit al claimants procedure where-apply for succession certificate 414,
      S-62
```

```
joint success on certificate cannot be granted to- 115
Rual talls procedure where two-are et up by two persons 338
Sale by executor or administrator (sec 307):
      under grants sub-equently revoked 313r
    executor's power of-green by the will 301:
    restrictions in the will on the executor's power of- 361
Satisfaction legacy to creditor does no amount to-of his debt 191
Security revocation of probate or letters of administration on failure to furnish-or
      additional - 299 301 302 332
    administrator is bound to give - 332
    - may be demanded from executor 332
    meaning of- (sec 370):
    Judge may demand-before granting succession certificate 417
    - to be given by guardian on behalf of minor 1172
    -whether to be taken from widow 417:
    amount of- 117
    as ignment of-bond, 118
    appeal from order granting ucce sion certificate conditional on furnishing - 425
Signature of testator 53:
    -of witness appearing on some papers of the will 53
    -may be by initials 53
    there the-is to be placed 56
    acknowledgment of-by testator 59
    -of attesting witness 60
Solemn form proof of will in- 327
Special proceeding meaning of 354B
Stecific legacy defined (sec 142)
    distinction between general and- 169
    when-does not abate with general legacy (sec 149)
    ademption of- 174;
    -subject to pledge or mortgage (.ec 167)
Sound disposing mind what constitutes a- 37
    presumption and burden of proof in respect of- 38
Subsequent will revocation of will by- 71
    revocation of grant on discovery of- 299
Succession certificate power of High Court to grant- 2
    -when necessary (sec 214)
    -is not necessar, before filing of uit but is necessary before passing of decree 231;
    Appellate Court should give opportunity to produce- if it was not presented before
      first Court 231
    objection as to want of-taken before Appellate Co.irt 231
    persons v ho are bound to take- 236
    -is not neces ary where plaintift claims by survivorship 237
    person succeeding to impartible estate need not take- 237
    -necessary before execution of decree 239
    effect of-on subsequent probate or administration (sec 215)
    -cannot be granted where probate or letters are necessary 408
    application for- (sec 372)
    application for -- for portion only of the debt 231
    application for-by minor 410
    contents of application for- 410
    application for-by assignee of heir of deceased, 236 410,
```

```
no limitation for application for- 411
   second application for-after rejection of first, 411;
   procedure in proceeding for- 412
   10:nt- 415
   contents of- 416
   extension of- 419
   amendment of- 416
   court fees on- 420
   effect of- 421
   revoration of- 424
   -has no retrospective effect 422.
    appeal from order granting refusing or revoking- 425
    validation of payments made under-subsequently revoked (sec. 386)
Sureties liability of-under administration bond 332A;
    -are not entitled to be discharged on ground of mal administration by the admi
      nistrator 332A
    -cannot withdraw from suretyship on the ground that administration has been
      completed 332A
Surresorship rule of succession by-does no apply to family of Hindu converts to
      Christianity 26
    property which passes by-docs not vest in an executor 223
     no succession certificate is necessary when property passes by - 237
 Technical words no-are necessary in a will 80
     construction of- 81e
 Tenancy in common is presumed in case of bequest to two persons 117;
     English rule of joint-is not favoured in India 117
     instances of- 117
 Testamentary capacity 37
 Testator intention of- 82 95
 Title no question of-on proceeding for grant of probate or administration 242 340
      where rival claimants claim succession certificate. Court shall grant certificate to
        person having prima facie the best- 413
      to what extent-shall be inquired into in proceeding for succession certificate 412
        413
  Trustees-proper procedure for removal 348A
  Ulterior bequest when-takes effect on failure of prior bequest 152
      when-does not take effect on failure of prior bequest 153
  Unborn person bequest to a class some of whom are- 122
      child in the womb is not an- 122 125
      bequest to-is void 121 124
       bequest to-subject to a prior bequest (sec 113)
       bequest of life interest to-is void 125
  Uncertainty will or bequest void for- 97
       charitable bequests are not void for- 97
   Undue influence will obtained by- 49
       persuasion or intercession is not-- 49
       -of wife 49
       -of per on in fiduciary relation 49
       presumption and burden of proof in cases of- 50
   Venification of petition for probate or administration (see 280
   Vested interest and contingent interest distinguished 135
       construction whether interest is-or contingent 137,
```

```
postponement of enjoyment of- 138
    prior interest given to some other person in case of 138
Vesting time of of legacies 114
    distinction between-in interest and-in possession 114 138
    vested legacy may be divested by disclaimer 114
    -is not postnoned in a vested interest 136.
Wages for servants are to be paid before all debts (sec 322)
Whole suterest 100
IV-II defined 6
    form of 64
    characteristics of 6A
    mutual 7
    may be conditional 7
    ioint- 7
    what documents do or do not constitute a will &
    _is always recorable 6 51
    dispositions in-take effect after the death of testator 6
    -must contain disposition of property 6
    oral-was valid in certain places before the present Act 52
    -executed by Talukdar in Oudh under the Oudh Estates Act 6 52
    -contained in several sheets of paper need not be signed on every sheet 53
    -contained in several sheets of paper written by different pens and inks is not
      invalid 53
    persons capable of making- (sec 59)
    privileged- (sec 65)
    rules for construction of- 80A:
    surrediction of Court to construe- 82
    filing of- (sec 294)
Withdrawal of renunciation by executor 255
    -of renunciation by administrator 255
    application for probate cannot be withdrawn 311
B stnesses shall sugn 60
    -not disqualified by interest or by being executor (sec. 68)
H ords construction of- 81:
    -- omitted may be supplied 85A
    -where canable of two-fold construction 92:
    -of limitation 105:
```

what are not-of limitation 106

-expressing relationship (sec 100)

effect of-describing a class added to bequest to person (sec 97)